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No. 10804

Vol
2391

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHESTER BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

OCT 4 - 1944

PAUL P. O'BRIEN,
CLERK

No. 10804

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BANKS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

MR. JEFFREY HEIMAN,

415, 1411 Fourth Ave. Bldg.,
Seattle, Washington,

Attorney for Appellant.

MR. J. CHARLES DENNIS,

United States Attorney,
1012 U. S. Court House,
Seattle, Washington.

Attorney for Appellee.

MR. ALLAN POMEROY,

Assistant United States Attorney,
1012 U. S. Court House,
Seattle, Washington.

Attorney for Appellee. [1*]

United States District Court
Western District of Washington
Northern Division

November Term, 1943

No. 46311

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHESTER BANKS,

Defendant.

INDICTMENT

United States of America
Western District of Washington
Northern Division—ss.

Vio. Sections 2591a and 2593a Title 26, U.S.C.A.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

Count I.

(2591a-26-Sale)

That Chester Banks, on or about the 25th day of September, 1943, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously transfer a certain quantity of marihuana, to-wit, One (1) Marihuana

Cigarette, not in pursuance of a written order of the person to whom such marihuana was transferred, and not on a form issued in blank for that purpose by the Secretary of the Treasury; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

Count II.

(2591a-26-Sale)

That Chester Banks, on or about the 10th day of October, 1943, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously transfer a certain quantity of Marihuana, to-wit, Two (2) Marihuana cigarettes, not in pursuance of a written order of the person to whom such marihuana was transferred, and not on a form issued in blank for that purpose by the Secretary of the Treasury; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

Count III.

(2593a-26-Possession)

That Chester Banks, on or about the 10th day of October, 1943, at Seattle, in the Northern Di-

vision of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously have in his possession a certain quantity of Marihuana, to-wit, Two (2) Marihuana Cigarettes, not in pursuance of a written order form and without having registered and paid the special tax as required and imposed by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. CHARLES DENNIS

United States Attorney

[Endorsed]: A true bill, Stephen S. Floe, Foreman. J. Charles Dennis, United States Attorney.

ALLAN POMEROY

Assistant United States Attorney

[Endorsed]: Presented to the Court by Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court, Mar. 15, 1944. Judson W. Shorett, By Lee L. Bruff, Deputy. [3a]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above Entitled Cause, Find the defendant, Chester Banks

Is guilty as charged in Count I of the Indictment herein;

Is guilty as charged in Count II of the Indictment herein;

Is guilty as charged in Count III of the Indictment herein.

Dated at Seattle, Washington this 16 day of May, 1944.

L. B. HATCH

Foreman

[Endorsed]: Filed May 16, 1944. [4]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant herein and move the Court for a new trial on the grounds:

1. Error of law occurring at the trial and excepted to by the defendant.

2. That the evidence is insufficient as a matter of law to prove the guilt of the defendant.

PAUL D. COLES

Attorney for Defendant

Office and P. O. Address:

1410 Hoge Building

Seattle 4, Washington.

[Endorsed]: Filed May 18, 1944. [5]

[Title of District Court and Cause.]

HEARING & ORDER CONTINUING

Now on this 22nd day of May, 1944, Allan Pomeroy, Assistant United States Attorney appearing for the plaintiff and Attorney Paul Coles appearing for the defendant this cause comes on before the Court for hearing on the defendant's motion for New Trial. The defendant is present. Argument is had on said motion and the motion is denied, exception allowed. On request of the defendant's counsel, imposition of sentence on the verdict of Guilty is continued to 9:30 A.M. May 27, 1944. Mr. Pomeroy makes no objections.

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United States District Court
Western District of Washington
Northern Division

No. 46311

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHESTER BANKS,
Defendant.

JUDGMENT AND SENTENCE

Comes now on this 29th day of May, 1944, the

said defendant Chester Banks, with his attorney, into open Court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, and the verdict of the jury finding defendant guilty on Counts I, II and III, it is

Considered, Ordered and Adjudged by the Court that the said defendant Chester Banks is guilty as charged in Count I, II and III of the Indictment and that on Count I of the Indictment he be committed to the custody of the Attorney General of the United States for imprisonment in the United States Penitentiary, McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Two (2) years.

It is further Considered, Ordered and Adjudged by the Court that the said defendant Chester Banks on Count II of the indictment, be committed to the custody of the Attorney General of the United States for imprisonment in the United [7] States Penitentiary at McNeil Island, Washington, for the period of Two (2) years;

Provided, however, that the execution of the sentence on Count II of the indictment shall run

concurrently with and not consecutively to the execution of the sentence imposed on Count I of the indictment.

It is further Considered, Ordered and Adjudged by the Court that imposition of sentence herein in Count III of the indictment be suspended for a period of One (1) year, effective upon the expiration of the sentence imposed on Counts I and II herein, during the defendant's good behavior and during which time said defendant shall be placed upon probation as provided by the statutes of the United States relative to probation until further order of the Court; and further upon the express condition that said defendant does not during said one-year probationary period violate any laws of the United States or of any state or community where he may be, and that he does not, directly or indirectly, have any participation or contact with marihuana or the use thereof or with those using, possessing or trafficking in the same, and that he does not engage, directly or indirectly, in the tavern business; and that during such period he shall report regularly to the United States Probation Officer at the times and in the manner said officer shall direct; and that if the said defendant during said period so complies with all of the terms relating to the suspension of imposition of sentence and probation granted, upon the expiration of the said one-year probationary period, the said defendant shall be released from all liability under Count III and said Count shall be dismissed.

It is the recommendation of the Court that the [S] suspension of imposition of sentence on Count III shall not in any way interfere with the good time granted or affect the parole rights of the defendant.

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Warden of the United States Penitentiary, McNeil Island, Washington, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in Open Court this 29th day of May, 1944.

LLOYD L. BLACK

United States District Judge

Presented by:

ALLAN POMEROY

Asst. United States Attorney

Violation of Sections 2591a & 2593a, Title 26, U.S.C.A. (Marihuana Tax Act of 1937 sale and possession of marihuana)

[Endorsed]: Filed May 29, 1944. [9]

[Title of District Court and Cause.]

CONSENT TO SUBSTITUTION OF
ATTORNEY

Comes Now Paul D. Coles and hereby consents to the substitution of Jeffrey Heiman as attorney of record for Chester Banks, the defendant herein.

Dated at Seattle Washington this 25th day of May, 1944.

PAUL D. COLES

[Endorsed]: Filed May 29, 1944. [10]

[Title of District Court and Cause.]

ORDER ALLOWING SUBSTITUTION
OF ATTORNEY

This Matter having come on regularly before the undersigned one of the Judges of the above entitled Court. It appearing to the Court that Paul D. Coles has filed herein his consent to have Jeffrey Heiman substituted as attorney for the Defendant herein.

Now therefore it is hereby Ordered that said substitution be and the same is hereby allowed.

Done In Open Court this 29th day of May, 1944.

LLOYD L. BLACK

Judge

Presented by:

JEFFREY HEIMAN

Approved:

CHESTER BANKS

[Endorsed]: Filed May 29, 1944. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Name and Address of Appellant is Chester Banks, 673 Seattle, Washington.

2. The name and address of appellant's attorney is Jeffrey Heiman 1411 Fourth Avenue Building, Seattle, Washington.

3. The offense with which the appellant is charged is Section 2591a and 2593a Title 26, U.S. C.A.

4. The appellant's motion for a new trial was denied on the 22nd day of May, 1944.

5. Sentence was imposed on the 29th day of May, 1944 and the Court sentenced the Defendant to Two Years at McNeil's Island on counts I and II of the indictment to run concurrently and gave the Defendant one year probation on Count III., to commence after the service of sentence on Counts I and II.

6. The appellant is now out on \$4,000.00 bail.

I, the above named appellant, through my attorney Jeffrey Heiman hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit from the Judgment of the above entitled Court above mentioned on the grounds set forth below.

CHESTER BANKS

Appellant

Attorney for the Appellant

JEFFREY HEIMAN

Copy Rec'd. 5/29/44.

ALLAN POMEROY

Asst. U. S. Atty. [12]

GROUNDS OF APPEAL

1. The appellant appeals from the ruling of the lower Court in failing to strike the testimony of the witness Love to which ruling an exception was taken and allowed.

2. The Court failed to sustain the Defendant's challenge to the legal sufficiency of the evidence made at the conclusion of the Government's case and at the conclusion of the introduction of all the evidence, which exception was allowed.

3. The Court failed to instruct the Jury to return a verdict of Not guilty in behalf of the Defendant on all counts of the indictment.

4. The Court erred in failing to grant the Defendant a New Trial after motion for New Trial was timely made and argued to the Court.

5. The Verdict of the Jury was not supported by the evidence.

6. The Court erred in not granting the Defendant's motion in arrest of judgment.

JEFFREY HEIMAN

Attorney for the appellant

[Endorsed]: Filed May 29, 1944. [12a]

[Title of District Court and Cause.]

ORDER FIXING TIME FOR SETTLING
BILL OF EXCEPTIONS

Now on this 2nd day of August, 1944, Allan Pomerooy, Assistant United States Attorney appearing

for the plaintiff and Attorney Jeffrey Heiman appearing for the defendant this case comes on before the Court, and the Court now fixes 9:30 A.M. August 28, 1944 as the time for settling the bill of exceptions for the record on appeal, both counsel agreeing thereto.

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[13]

[Title of District Court and Cause.]

ORDER TRANSMITTING EXHIBITS

This matter having come on regularly before the undersigned, one of the Judges of the above entitled Court; it appearing to the Court that a stipulation has been entered into herein signed by attorneys for the United States Government and for the Defendant herein; the Court being in the premises duly advised,

It is Hereby, Ordered, Adjudged and Decreed that the original exhibits herein be *setnt* to the Circuit Court of Appeals in connection with the appeal herein.

Done In Open Court this 28 day of August, 1944.

LLOYD L. BLACK

Judge

Presented by:

JEFFREY HEIMAN

Attorney for Defendant

O. K.:

J. CHARLES DENNIS

U. S. Atty.

ALLAN POMEROY

Asst. U. S. Atty.

[Endorsed]: Filed August 28, 1944. [14]

[Title of Court and Cause.]

PRAECIPE

To the Clerk of the Above-entitled Court:

You will please certify to the Circuit Court of Appeals the following:

I. The Indictment. II. Verdict of Jury. III. Motion for New Trial. IV. Notice of Appeal and Grounds for Appeal. V. Consent to substitution of attorneys. VI. Order allowing substitution of attorney. VII. Judgment and Sentence. VIII. Minute entry fixing time for Settling Bill of Exceptions.

JEFFREY HEIMAN

Attorney for Appellant.

Copy Rec'd 8-29-44

J. CHARLES DENNIS,

U. S. Attorney

Received Office of U. S. Attorney, Aug. 29, 1944,
Seattle, Wash. Ref. to.....

[Endorsed]: Filed Aug. 29, 1944. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,
Western District of Washington—ss:

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 15, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by praecipe of counsel filed *ans* shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the original Bill of Exceptions, and Assignment of Errors, sent up as part hereof, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I transmit herewith as part of the record on appeal in this cause the original Bill of Exceptions and Assignment of Errors.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or re-

turn to the United States [16] Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return: 33 folios at 15c	\$ 4.95
Appeal fee. (Section 5 of Act)	5.00
Certificate of Clerk to Original Exhibits....	.50
Certificate of Clerk to Record on Appeal....	.50
<hr/>	
Total	\$10.95

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 2d day of September, 1944.

[Seal]

JUDSON W. SHORETT,

Clerk, United States District
Court for the Western Dis-
trict of Washington,

By TRUMAN EGGER

Chief Deputy. [17]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Comes now the Defendant above named and by his attorney Jeffrey Heiman, submits the following Proposed Bill of Exceptions herein. Be It Remembered that heretofore, on to-wit, the 16th day of May 1944, this case came on for trial before the

Honorable Loyd L. Black, one of the Judges of said Court and a Jury, duly impaneled and Sworn, the Plaintiff appearing by Allan Pomeroy, Ass't United States Attorney and the Defendant appearing by his attorney Paul D. Coles and the following proceedings were had.

The Jury was impaneled and sworn.

Opening statements were made by respective counsel.

TOWNSEND DAVIDSON

was called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

“My name is Townsend Davidson and at the present time I am a musician in the City of Seattle. I have been so employed for about one month. I am 32 years old. I am charged in this Court with possession of marijuana. Prior to the time I was charged and arrested I was with the General Electric doing radar work. I was an expert at this. I know Chester Banks. I first met him about the last part of September, 1943. I have been an occasional user of marijuana. I have used it for many years about ten or twelve. I met Chester Banks at the Seagull Tavern on Jackson Street. I believe he is the owner of the tavern. I first met him outside the tavern. A colored boy introduced us. We had a conversation about marijuana at that time. I asked him if he could sell some and he stated that he could get some. He got a marijuana cigar-

(Testimony of Townsend Davidson.)

ette and we three got in my car and smoked it. We drove up Jackson and around the block a few times.

Q. Did you have a further conversation about marijuana with Chester Banks?

Mr. Coles: Just a minute. I object to that and ask that the Court strike the answer that he smoked a marijuana cigarette. I don't think he has shown he is an expert to testify it was a marijuana cigarette. He said he used marijuana 10 or 12 years, but I don't think that that makes him competent to testify as an expert as to whether or not a cigarette is marijuana or not unless there is something more shown than that.

The Court: Objection overruled.

Mr. Coles: Exception.

The Court: Exception allowed.

The Witness continued: I asked him if he could get anymore and he said that he could at a later date and that I should stop in and see him at the Seagull, which I did. This was in the latter part of September, 1943. I next saw the Defendant a week or so later at the Sea Gull. With just the two of us present in the evening I asked him if I could buy some marijuana cigarettes and he said yes. So I bought two marijuana cigarettes from him.

Mr. Coles: I object on the ground that he is not competent to testify that they were marijuana.

The Court: Objection overruled.

"I paid him \$2.00 for two cigarettes. I went back a third time and asked him for some about the first

(Testimony of Townsend Davidson.)

part of October and a colored boy named Leonard Love was present at that time with the Defendant. I asked him, it was in the evening, if he had any marijuana to sell and he introduced me to Mr. Love and said in the future Love would take care of the sales. That is all the conversation I had with the Defendant at that time. I had another conversation with him about the middle or latter part of October at the Sea Gull, Mr. Jenkins was present at that time. Love wasn't there and I asked Mr. Banks about buying some more and he introduced me to Jenkins and said that Jenkins would take care of it instead of Love. Banks didn't say that Love had lost his connection with Chester. I purchased marijuana from Love and Jenkins. In the latter part of September when I got the one cigarette from Banks I paid him one dollar. In the first part of October I bought two from him for \$2.00. I did not see where he was keeping them or where he got them. He had them in his hand. After I was arrested in the Marshall's office I had the following conversation with the Defendant. He stated that he knew I had made a statement about him and that I would get no place by admitting anything or involving him, and that I should deny the story and state that it was made under stress and that I only went up there to talk music with him and drank some particular brand of wine which he had. He told me to say that I was afraid that I might be beat up by the police.

(Testimony of Townsend Davidson.)

Cross Examination

By Mr. Coles:

I am not a government agent and have not been paid by the narcotics department or the government. I was arrested by the Seattle Police on Feb. 10th in connection with a coat and jacket and having the keys in my possession, to some woman's room. Up until then I had not mentioned marijuana to anyone. I told the officers that I had marijuana in my room and they took me up to the room and found it. I was not charged by the police and the case against me about the coat was dropped. I bought some marijuana from Mr. Banks in September. I am charged by the government with having marijuana in my possession. I have decided to plead guilty and I have naturally discussed the matter with the government agents. My case has not come up as yet.

I never saw Mr. Banks before the latter part of September, and on the first occasion I saw him I purchased marijuana. I had been in the Sea Gull before. I smoke marijuana with colored people occasionally. Not habitually just occasionally. I was drinking a little on the occasion in September. I don't remember the name of the man that introduced me to Mr. Banks. I had seen that man before on Jackson Street. I do not remember his name. I have known Love only since September 1943 and I met him at the Seagull.

(Testimony of Townsend Davidson.)

Re Direct Examination

By Mr. Pomeroy:

“I have been out on bond since my arrest and have not used marijuana since then. The last time I used marijuana was last January.

Recross Examination

By Mr. Coles:

“I do not believe that using marijuana has affected me memory.”

LEONARD LOVE

was called as a witness in behalf of the Plaintiff and testified as follows; after being duly sworn:

Direct Examination

By Mr. Pomeroy:

“My name is Leonard Love and I live at 1046½ Jackson Street in Seattle. I am now working at the Shipyards. I know Mr. Townsend Davidson. I have been indicted in this Court, charged with transfer and possession of marijuana. I have been indicted in this Court, charged with transfer and possession of marijuana. I have pleaded guilty to the charge and have not been sentenced yet. I know Chester Banks since September 1943. He owned a tavern The Seagull. I didn't work for him in the beer tavern and I didn't work for him any place. In the early part of October 1943 I heard a conversation between Banks and Davidson. Davidson came to me and said Chester Banks sent him

(Testimony of Leonard Love.)

to get some marijuana. I gave it to him and I had gotten it from Chester Banks. I had given it to him at other times also, which I had gotten from Chester Banks. I did that for Mr. Banks for a couple of months until we had a fight, when I quit fooling around with him. Davidson gave me a dollar a stick. I gave Mr. Banks over half of it. The reason for my argument with Chester Bank's was I had spent the money and couldn't pay him. In two months Chester gave me fifty sticks at a time. I don't know much but I got fifty a few times from him.

Cross Examination

By Mr. Coles:

"I have never used marijuana cigarettes never smoked one."

Mr. Coles: Your Honor, I think his testimony should be stricken on the ground of the objection that I made before while the jury was absent; there is nothing to show here that he knows anything about marijuana.

Mr. Pomeroy: If the Court please, my questions did not refer to marijuana. I think if you will look in the record I said, "Did you pass these sticks."

The Court: Just a minute. Whatever questions were answered were answered without objection. They are in evidence. You may continue with the cross examination.

The Witness Continued:

Mr. Banks introduced me to Mr. Davidson. I had seen Davidson a couple of times on Jackson Street.

(Testimony of Leonard Love.)

I can't remember the month I met him, but I think it was around the 15th or 16th of August 1943. I didn't meet him at the Seagull Tavern but Chester in the middle of August 1943 introduced me to him on Jackson Street. About the 1st of October 1943 I was arrested by the City and put in jail over some trouble with a woman. I was on parole at that time.

The parole officer didn't tell me but I knew that unless I got out on bail that my parole would be revoked. So I called up Mr. Banks from the jail house. I thought that my bail would be \$25.00, but later found out that it was \$125.00. Mr. Banks went good for that bail and I got out of jail. The bail was forfeited and I never paid Mr. Bank's back the money. That is the reason for the fight that I had with Mr. Banks. I hit him on the head which I had to do to stop the fight and from that day to this we haven't spoken.

Redirect Examination.

By Mr. Pomeroy:

"Mr. Banks told me that I owed him a \$150.00. He said that was for bail money. When he got me out, I started to sell the sticks, that was part of the bail to get me out. There was an arrangement made that I could sell for him and I sold and gave him the money. One night I spent the money and didn't have it so he started to fight and we ended up by my hitting him on the head."

(Testimony of Leonard Love.)

Recross Examination.

By Mr. Coles:

“I was in jail in October, I don’t know the exact time when my bail was forfeited, I don’t know whether it was the 18th of October or not. I can approximate the date when I was arrested. I think I was in jail 15 days. I believe it was in August, about the 15th. I am charged with having transferred on January 20th, 1944 five or six cigarettes, and on the 12th of February I am charged with 8½ cigarettes. I haven’t talked to Mr. Banks or have had anything to do with him since November 29th 1943. I pleaded guilty to those sticks, when Chester Banks introduced me to him about cigarettes. Yes, I pleaded guilty to the 8½ cigarettes. That was sale not possession. Yes, I pleaded guilty to one count that charged me with possession with marijuana cigarettes. I guess that the other counts were dismissed, although I don’t know. My sentence was put over to the 19th of May.”

Mr. Pomeroy: The Government rests.

Mr. Coles: Your Honor, I would like to make a motion.

The Court: The jury is again excused subject to call.

(Jury retires.)

Mr. Coles: May it please your Honor, I would like to make a motion for a directed verdict as to Counts 1, 2 and 3 of the indictment. One of the reasons is that I don’t think there is evidence here

sufficient to let this case to the jury as a matter of law. The only testimony at all in relation to marijuana comes from the lips of Townsend Davidson. The other witness did not testify what he handled was marijuana, but that he handled some sticks. He didn't say it was marijuana or what it was.

The Court: Counsel, I am satisfied, did say marijuana. I am satisfied if you will read all the questions and answers you will find Mr. Pomeroy said marijuana and the witness agreed. At least, in argument I will hear you on the theory that he did say that he handled marijuana.

Mr. Coles: I still think the testimony of the second witness should have been stricken if he so testified because there is nothing in the record at all that shows him to be a competent witness to testify that these cigarettes were marijuana cigarettes. I objected to that when the question was first raised.

The Court: I sustained it when you objected.

Mr. Coles: And I thought it was in the Court's mind and I thought at all times counsel for the Government would demonstrate that this person had some competency to testify what they were, and that is the reason I did not object to them at the time the questions were asked, because I had already raised my objection, and I thought that counsel had it in mind, and the Court having it in mind, that he would establish that before he asked the question again,—establish this man's competency. There was nothing at all to show that he was an

habitual user of cigarettes and can tell a marijuana cigarette from an alfalfa cigarette. I think I was entitled to have that testimony stricken on that ground. I have made every effort to protect the record and I do not wish to continue to object after it was brought to the Court's attention and Counsel's attention. I thought certainly Counsel would show it before the question was asked again. Now, counsel says he did not ask him or that he didn't state that it was marijuana. I have no definite recollection whether he said it was marijuana or what it was.

Mr. Pomeroy: I said sticks at all times.

Mr. Coles: I would like to renew my motion to strike that testimony from the record.

The Court: If the evidence is in, your motion comes too late. If it is not in, of course, it doesn't need to be stricken. I think it is in, and if in, the motion is denied. Its counsel's obligation, of course, not the Court's, to watch the testimony.

(Extended argument by Mr. Coles)

The Court: I am satisfied that the testimony of a user of marijuana for ten years is sufficient to establish it was marijuana. It has been brought out in this case by the government and verified by the defense that the witness was charged with marijuana and that he expects to plead guilty. That is simply a further guarantee that he knows what marijuana is. He has testified that he has used marijuana and that he got it. Unquestionably, if he

used it, he got it somewhere. He testified that after he had gotten a certain amount from the Defendant he met the defendant and the defendant told him to get it from Love. Now, Love comes in and says that the Defendant told him that Davidson was okey and that the Defendant furnished him marijuana or sticks, whichever we care to call it, after the witness Love was under substantial financial obligation to the Defendant.

I personally have said that I don't think there is any question of law involved in the case by virtues of Love's testimony; that is, if the testimony of the Defendant Davidson is not sufficient to show that there was marijuana, then of course the testimony of the Defendant Love is not sufficient. If the testimony of Davidson is enuf as a matter of law, we don't need the testimony of Love. But when we find it shown by the government, and again verified by the defendant, that Love has pleaded guilty in this Court to possession of Marijuana, that is a little bit more of a substantiating circumstance to indicate that he knows what marijuana is. At least, it would indicate that he had had some connection with marijuana. It might be that Love's testimony standing alone would be enuf to go to the jury. I don't think so. If we had the witness Love here and no other, with the testimony as given, I would not feel that your motion was not well taken. I may be a bit too technical. It might be that the circumstances combined with the testimony would indicate that he had enuf knowledge of marijuana

to put the Defendant on his proof if he wished to deny that it was marijuana. But Davidson certainly is qualified to testify what marijuana is. To say he was not would be to state that any one that had used tobacco for ten years was not qualified to testify that he had smoked a cigarette made of tobacco on a certain day.

I am satisfied there is sufficient evidence to go to the Jury. Whether the Jury is going to be convinced beyond all reasonable doubt by this testimony is something else again. They may not be impressed with the testimony of one who uses marijuana. They may not be impressed with the testimony of one who has pleaded guilty to the possession of marijuana and who states that that he had had a rather violent dispute with the defendant. But that is the jury's problem, not mine. If the Jury believes the witness Davidson and the witness Love and is convinced beyond all reasonable doubt that what they said was true, the jury would be obligated under their oath to find the defendant guilty. I am satisfied they would have the right so to do. The jury may not believe anything that has been testified so far by virtue of the connection of the witness with marijuana.

The motion is denied.

Mr. Coles: Exception.

The Court: Exception allowed.

OPENING STATEMENT BY MR. COLES.

CHESTER BANKS

Being first duly sworn testified in his own behalf as Defendant as follows:

My full name is Major Chester Banks and I was born in Roanoke, Virginia, April 16th, 1916. I have been away from home about 10 years. There were nine children in our family and after I went through the ninth grade at school I left home. I was in trouble when I was a kid, from running around with a lot of kids. When I left home I went to West Virginia to work in the coal mines. Then to Ohio and then out West. I was thrown in jail quite frequently during the depression, because I didn't have a job and for riding on freight trains. I was never convicted of anything serious, but was convicted of stealing when I was hungry. After being in California I came to Seattle in 1938 or 1939. I worked for a doctor in Tacoma doing janitor work in April 1940 I took out my seaman's papers and went to sea, working in the steward's department. I am a member of the Merchant Marine and have kept my membership since 1940. In 1942 I was interned in the Orient. I was in the hospital and when I got out, I returned to Seattle, and bought this Tavern from the Japanese and opened it in July of 1942. This tavern is located at 673 Jackson and the patrons are 99% colored. I have operated the place continuously with a license from 1942 until the present date. I made a trip or two in 1943 and left somebody else in charge. Exhibit

(Testimony of Chester Banks.)

A is my Seaman's discharge from the S. S. Joseph Meek. One shows when I got off and one when I got on. Exhibit C. is a continuation of the same discharge, it showed that I signed on, on the 29th day of June, 1943. (Defendants exhibit A and C admitted in evidence) [Printer's Note: Set out on pages 37 and 38.] Exhibit B is a release from the Chief Steward August 23rd, 1943. (Exhibit B admitted in evidence) [Printer's Note: Set out on page 39]. I reopened my place on the 15th of September, it took me about two weeks to get the place stocked up and ready for opening on September 15th, 1943. During the months of October and November of 1943 I was operating on a temporary license and I finally got my new license on December 1st, 1943. During this time, that November and December and October, I was under the strict observation of the Court.

I did not know Davidson's name until I was arrested and brought to the Federal Court House and they showed me a statement which he had signed. I had seen him before on Jackson Street in the company of Mr. Love, that is about the latter part of October. I saw him in front of the Tavern on Jackson Street, talking to Mr. Love, at that time I said something to Love about his trial and about the money he owed me for getting him out on bond. The next time I saw Davidson he came into my Tavern and inquired for Love. I should say that that was about the 5th of November I noticed that he was the only white person in the Tavern, so I went over and talked to him. I usually do that

(Testimony of Chester Banks.)

when white people come into the Tavern because I want to avoid any racial trouble I asked him what he was there for and he asked me if I knew Love. He also asked me if I knew a fellow named Brown. He told me that he was a musician, interested in colored music and we discussed records and music. I told him where he could get colored recordings, naming the place. My tavern is public and anyone can come into it. I met Mr. Love by just coming in and out of the place. I was never formally introduced to either Love or Davidson. Davidson told me that Love was a friend of his. I met Love before I met Davidson, about three weeks before. About the 1st of October he called me up at the Tavern one night about 9 o'clock. He asked me if I would do him a favor and put up \$25.00 bail, he said he was in jail and that because it was War time he could get a job and pay me back easily. He stated that he was out on parole and if he didn't get out of jail, he would be called before the Parole Board. I didn't want to let him have any money, because he wasn't a friend of mine, but I felt sorry for him. So I went to the Police Station with \$25.00 to get him released on bail. They told me it was a \$125.00 and said that I could go and see him. I went upstairs to see him and told him that I couldn't put up that money. He cried and I felt sorry and I went over to a Bail bond office and the bail bondsman put up his bail, which I guaranteed. His trial was set over to October 14th, which was two weeks from the time that he was arrested. During the

(Testimony of Chester Banks.)

two weeks he was supposed to pay me back but he didn't. One day I saw him on the street and he said I will pay you sometime but I haven't got it on me now and he said "If you will come on with me, I will pay you some of it". I went with him to the place next door and then he came from the back and hit me on the head. That was on the 29th day of November and that was the last time I spoke to him. I never used any marijuana and I am not familiar with it. I never did discuss marijuana with Davidson but talked music with him. I never did make any arrangements with Love to furnish sticks of any kind. The only trouble I had with him was over the money for bail. I never got any of my money back from him. When I was brought to jail on this case I saw Davidson and he asked me why I was there and we got to talking. I told him I was in for marijuana and he said he was in for marijuana too. He said his name was Townsend Davidson and I said to him that his name was on the warrant or certificate in my case. I asked him why and he said that he was asked a lot of questions and he didn't know and he was asked if he had been in my tavern and he said yes. I asked him what he had told them about me so that his name was on my papers and he said that "I never said anything to them. They said that they knew concerning you or something of me" which was just talk and I just didn't know what to do. "That is the only conversation I had with him in jail. I just couldn't understand the man. I never gave him

(Testimony of Chester Banks.)

any narcotics and never had any in my possession. During all the time that I was operating the Sea Gull Tavern nobody ever complained to me about marijuana or that there was any there. The Federal men have been in my place and asked me about women but never about marijuana. There never was any complaint to the liquor board about marijuana. There never was to my knowledge anybody in the place who had marijuana in his or her possession. On February the 15th there was a lot of colored people arrested for possession of marijuana but no one was arrested in my tavern. I was not arrested till March. That was about a week after the big raids in the South end of Seattle for marijuana. On the night of the big raid the officers came to my hotel room and I answered the door. They asked me who I was and I told them. They then went about their business. I am still in the Merchant Marine Service. I am a paid up member subject to call at any time.

Cross Examination

By Mr. Pomeroy:

I mean by paid up member that I am a member of the Union and while nobody can force me to go to Sea I will go if they call me.

I first went to sea in 1940. I shipped out on the North Sea, Cape Olivia. I was in the Orient 64 days. I got sick on a trip in 1942 in Manilla and placed under Japanese observation. Plaintiff's exhibit 1 is my hospital discharge. (Plaintiff's exhibit 1 admitted for evidence) [Printer's Note: Set out

(Testimony of Chester Banks.)

on pages 39 and 40]. I was in the hospital about 10 days, 4 days of it I was under observation. I am not married I am 28 years old, classified 2B. I was convicted in Roanoke, Virginia, for house-breaking and larceny and store breaking. While I received a year and a day sentence, I didn't stay there that long. In 1934 I was thrown in jail and I did not know what I was in for. On February 1935 I received a 2 year sentence in West Virginia but I don't know what the charges were, I received a 90 day sentence in jail for vagrancy in 1936 in California. In 1937 in El Centro, California I was convicted of petty theft. I was given 60 day suspended sentence in Tacoma for disorderly person. I didn't do any time. I don't know if people convicted of handling marijuana hang around my parlor. I never heard of any talk of marijuana there. First time I saw Davidson was in the store entrance when I stopped to talk to Love to ask him for the money that he owed me. I didn't talk to him about the trial except I told him that the trial was coming up on the 14th. Love was standing on the street taking to a stranger and I came up and asked him for my money, I didn't know Davidson. Love did not operate the shoe shine parlor next door to my knowledge. When Love hit me I went with him to the shoe shine, his coat was hanging in the back. I led the way to the shoe shine parlor although I don't know whether he was ahead of me or behind me. We started arguing about money, it was an open argument. If I was arguing about marijuana

(Testimony of Chester Banks.)

I wouldn't be openly arguing, there were no secrets. I denied going into the automobile and smoking a marijuana cigarette with Townsend Davidson. I deny having sold him two cigarettes on October 10th because I never bothered with that stuff. I don't fool with marijuana and I don't know anyone that has been arrested out of my place for marijuana except me.

Redirect Examination

By Mr. Coles:

"The certificate is dated April 16th, 1940 and that is when I got my registration with the U. S. Department of Commerce. I have seven thousand dollars invested in the tavern, that is all I got. In Sacramento I was walking up the street and I didn't have any money and they threw me in jail and I got a ninety day sentence to leave town. It was just that I was poor and colored. In El Centro, California I was working on a ranch covering cantaloupes at 2c a thousand. We weren't getting the 2c so we took some tomatoes to go into town to sell them. We were all put in jail for petty larceny. In 1942 I was in an argument about parking a car and I was arrested, that was when I came to Seattle."

Recross Examination

By Mr. Pomeroy:

"I was not arrested for living with a common prostitute in Tacoma. The Tacoma case was a continuing charge I was arrested for disorderly conduct. I left Tacoma and came back two months

(Testimony of Chester Banks.)

later and was arrested. (The Defendant rested and the Government offered no rebuttal)

Mr. Coles: At the conclusion of all the evidence I wish to renew my motion.

The Court: The record will show it is renewed and the motion is denied and exception allowed.

The Court instructed the jury. The jury returned a verdict as to the Defendant Chester Banks, finding him guilty on Counts I, II and III of the indictment which is more fully set out in the judgment and sentence appearing in the record herein; that thereafter motion for new trial was regularly made and brought on for hearing before the Court, argued and denied, all of which is set out more completely herein, to which denial the Defendant excepted at the time of entry of said order and exceptions were allowed; whereupon judgment was pronounced and the Defendant's sentence as will more fully appear in the Clerk's transcript.

Wherefore, the counsel for the Defendant, Chester Banks, present the foregoing Bill of Exceptions and pray that the same may be allowed as provided by the rules and practices of the Court.

JEFFREY HEIMAN,

Attorney for Defendant.

Office and P. O. Address:

415-1411 4th Avenue Building
Seattle, Washington

DEPARTMENT OF COMMERCE

Bureau of Marine Inspection and Navigation

CERTIFICATE OF DISCHARGE

Chester Banks
(Signature of Seaman)
William MacDonald
(Master of Vessel)

I Hereby Certify that the above entries were made by me and are correct and that the signatures hereto were witnessed by me.

Dated this 23 day of August, 1943.

WESLEY H. HAINES, S.D.
United States Shipping Commissioner
(or Master of Vessel)

Note.—Whenever a master performs the duties of the shipping commissioner under this act, the master shall sign the certification on the line designated for the shipping commissioner's signature.

[Endorsed]: Filed Sept. 5, 1944.

Name of Seaman Chester Banks
(In full)

Citizenship U. S.

Certificate of Identification No. Z 202 404

Rating (Galley Utility
(Capacity in which employed)

Date of Shipment 8-16-43

Place of Shipment Seattle, Wn.

Date of Discharge 8-23-43

Place of Discharge Seattle, Washington

Name of Ship S.S. Joseph L. Meek

Official No. 242 558 Class of Vessel Steam
(Steam, Motor, Sail or Barge)

Nature of Voyage Coastwise
(Foreign, Intercostal or Coastwise)

DEFENDANT'S EXHIBIT "C"

DEPARTMENT OF COMMERCE

Bureau of Marine Inspection and Navigation

CERTIFICATE OF DISCHARGE

Chester Banks
(Signature of Seaman)

W. MacDonald
(Master of Vessel)

I Hereby Certify that the above entries were made by me and are correct and that the signatures hereto were witnessed by me.

Dated this 18 day of Aug., 1943.

V. V. KEIFER D

United States Shipping Commissioner
(or Master of Vessel)

Note.—Whenever a master performs the duties of the shipping commissioner under this act the master shall sign the certification on the line designated for the shipping commissioner's signature.

Name of Seaman Chester Banks
(In full)

Citizenship U.S.

Certificate of Identification No. Z 202404

Rating Galley Utility
(Capacity in which employed)

Date of Shipment 6/29/43

Place of Shipment Seattle, Wn.

Date of Discharge 8/15/43

Place of Discharge Seattle, Wn.

Name of Ship Joseph L. Meek

Official No. 242558 Class of Vessel Steam
(Steam, Motor, Sail or Barge)

Nature of Voyage Coastwise
(Foreign, Intercoastal or Coastwise)

Serial No. G 776382

[Endorsed]: Filed Sept. 5, 1944.

DEFENDANT'S EXHIBIT "B"

Shipping Commission

8/23/43

Please sign off articles of S. S. Joseph L. Meek, bearer, Chester Banks galley utility—signed off by mutual consent.

M. HAMMER

Steward

[Endorsed]: Filed Sept. 5, 1944.

PLAINTIFF'S EXHIBIT No. 1

Treasury Department

No. 23-122

U. S. P. H. S.—Form 1918

March, 1925

CERTIFICATE OF DISCHARGE

From U. S. Marine Hospital At Seattle, Wash.

(Marine hospital or relief station)

May 4, 1942

This is to Certify that Banks Chester

(Surname)

(First)

(Middle)

was treated in the Hospital as a Hospital patient

(Hospital or dispensary)

(Hospital or out)

from 30-Apr-42, 19.....

(Date of admission)

to 4-May-42, 19.....

(Date of discharge)

Class of beneficiary: M.S.

Condition on discharge: Improved.

Reason for discharge: Further hospitalization unnecessary.

Certified service on last vessel: 16-Mar-42 21-Apr-42

Name of vessel: SS Olympic

Description Remarks:.....

Nativity Roanoke, Va.

Date of birth 16-Apr-1916

Color negro

R. M. GRIMM,

R. M. Grimm,

Complexion dark

Medical Director

Height 5' 9½"

CHESTER BANKS

Eyes brown

Chester Banks

Hair black

(Signature of patient)

Note.—Retain copy for station files.

[Endorsed]: Filed Sept. 5, 1944.

State of Washington,

County of King—ss.

I, Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington, Northern Division, and Judge before whom the foregoing cause entitled, "United States of America, Plaintiff, versus Chester Banks, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the said cause and the same are hereby made a part of the record therein; and I further certify that the said Bill of Exceptions, together with all of the exhibits and other written evidence on file in said causes, and

attached to said Bill of Exceptions, contains all the material fact, matters and proceedings heretofore occurring in the said causes and not already a part of the record therein; and said Bill of Exceptions and the exhibits attached thereto, are hereby made a part of the record in said causes, the Clerk of the Court being hereby instructed to attach all the exhibits thereto.

Counsel for the respective parties being present and concurring herein, I have this day signed this Bill of Exceptions.

In witness whereof, I have hereunto set my hand this 28th day of August, 1944.

LLOYD L. BLACK,

Judge of the District Court
of the United States.

[Endorsed]: Filed Aug. 28, 1944, Judson W. Shorett, Clerk. By Percy Maddux, Deputy.

[Endorsed]: Filed Sept. 5, 1944. Paul P. O'Brien, Clerk.

[Endorsed]: No. 10804. United States Circuit Court of Appeals for the Ninth Circuit. Chester Banks, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 5, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the District Court of the United States
for the Western District of Washington
Northern Division

No. 46311

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHESTER BANKS,

Defendant.

ASSIGNMENT OF ERRORS

Comes now the Defendant and files herein his assignment of Errors:

I.

The witness Townsend testified on page two of the Bill of Exceptions that he smoked a marijuana cigarette and Mr. Coles objected (page two of the Bill of Exceptions) to his testimony with reference to the fact that the cigarette was marijuana and the Court overruled the objections. A motion was made to strike the testimony of Mr. Townsend and the motion was denied. (Bill of exceptions page two.) This was an error.

II.

The Court committed error in refusing to sustain the motion of Mr. Coles (Defense Counsel) made (page 7 of the Bill of Exceptions) for a directed verdict as to Counts 1, 2 and 3 of the Indictment on the grounds that there was not sufficient evidence to go to the jury.

III.

The Court erred in failing to strike the testimony of the Witness Love after the motion to strike was duly made by Mr. Coles (Bill of Exceptions page 7). The motion was denied and exception taken (Bill of Exceptions page 10).

IV.

The Court erred in failing to sustain the motion of Mr. Coles made at the conclusion of the introduction of all the evidence the Court having stated "The record will show that it is renewed and the motion is denied and exception allowed."

V.

The Court erred in failing to grant the Defendant a New Trial after the motion for a new trial was timely made and argued to the Court.

VI.

The Court erred in not granting the Defendant's motion in arrest of Judgment.

JEFFREY HEIMAN,

Attorney for the Defendant.

Received a copy of the within Assignment of Errors this 31st day of Aug., 1944.

J. CHARLES DENNIS

Attorney for Plaintiff

[Endorsed]: Filed Aug. 31, 1944. Judson W. Shorett. By Truman Egger, Deputy.

[Endorsed]: Filed Sept. 6, 1944. Paul P. O'Brien, Clerk.

United States

Circuit Court of Appeals

For the Ninth Circuit

CHESTER BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10804

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

—
BRIEF OF APPELLANT
—

JEFFREY HEIMAN

415—1411 4th Ave. Bldg.,

Seattle, Washington,

Attorney for Appellant.

FILED

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PAUL P. O'BR

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United States

Circuit Court of Appeals

For the Ninth Circuit

CHESTER BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10804

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant was indicted in three counts of an Indictment. Count I accused the defendant with transferring one (1) Marihuana Cigarette not in pursuance to a written order of the person to whom such Marihuana was transferred and not on a form issued in blank for that purpose by the Secretary of the Treasury. This was on the 25th day of September, 1943.

Count II accused the defendant with transferring on the 10th day of October, 1943 two (2) Marihuana Cigarettes, not in pursuance of a written order of the person to whom such Marihuana was transferred and not on a form issued in blank for that purpose by the Secretary of the Treasury.

Count III charges the defendant on or about the 10th day of October, 1943 with having in his possession two (2) Marihuana Cigarettes not in pursuance of a written order form and without having registered and paid the special tax as required and imposed by law.

The jury returned a verdict of guilty on all three counts.

A Motion for a new trial was duly made (Tr. 5) and denied by the Court (Tr. 6). Judgment and sentence was entered and the defendant was sentenced to two years in the Penitentiary on Count I of the Indictment and two years on Count II of the Indictment. The sentence on Count II to run concurrently to the execution of the sentence on Count I of the Indictment. Sentence was suspended on Count III of the Indictment for a period of one year from the expiration of the sentence on Counts I and II of the Indictment (Tr. 8).

From this Judgment and Sentence this appeal is prosecuted.

The only evidence upon which the defendant was convicted was the testimony of two witnesses. The first, Townsend Davidson (Tr. 17) was charged with a violation of the law with reference to possession of Marihuana. He said that he had used Marihuana for about ten or twelve years. He stated that he had bought Marihuana Cigarettes from him on two occasions—in the latter part of September and in the first part of October he had purchased Marihuana Cigarettes from him.

The other witness was Leonard Love (Tr. 21) who also was indicted for possession of Marihuana and who said he gave some Marihuana to Davidson which he had gotten from the Defendant.

STATEMENT OF ASSIGNED ERRORS RELIED UPON

The Appellant will rely upon the following assigned errors set forth in the Transcript Page 42:

I.

The witness Townsend testified that he smoked a Marihuana Cigarette and Mr. Coles objected (Tr. 18) to his testimony with reference to the fact that the cigarette was

marihuana and the Court overruled the objections. A motion was made to strike the testimony of Mr. Townsend and the motion was denied. (Tr. 18). This was an error.

II.

The Court committed error in refusing to sustain the motion of Mr. Coles (Defense Counsel) made (Tr. 24) for a directed verdict as to Counts 1, 2, and 3 of the Indictment on the grounds that there was not sufficient evidence to go to the jury.

III.

The Court erred in failing to strike the testimony of the Witness Love after the motion to strike was duly made by Mr. Coles (Tr. 25). The motion was denied and exception taken (Tr. 28).

IV.

The Court erred in failing to sustain the motion of Mr. Coles made at the conclusion of the introduction of all the evidence the Court having stated "The record will show that it is renewed and the motion is denied and exception allowed."

V.

The Court erred in failing to grant the Defendant a New Trial after the motion for a new trial was timely made and argued to the Court.

VI.

The Court erred in not granting the Defendant's motion in arrest of Judgment.

ARGUMENT ON ASSIGNMENT OF ERROR
I AND III

The appellant wishes particularly to call this Court's attention to the fact that this entire case consists of the testimony of two witnesses who are themselves, law violators, they also had not been sentenced, only one having entered a plea of guilty, the other having stated that he decided to enter a plea of guilty.

The particular point raised by these two assignments is the question of whether or not the testimony of these two individuals should stand on the question of sale and possession of Marihuana. Assignment I deals with the question of whether the objection of Counsel to the testimony of Townsend that it was Marihuana should have been sustained. The Court took the viewpoint that one

who had used Marihuana for 10 to 12 years ought to know what it was. It will be noted that the witness made no test of the so called Marihuana. The witness stated he made a purchase of Marihuana in the latter part of September but he didn't say he used it, tested it nor was the same offered in evidence.

While the Courts have held that addicts may testify concerning purchase of opium they have indicated that such testimony was admissible "where he mixed it with water and drank it," *Pennachio vs. United States*, 263 Fed. 66. This witness did not testify that he used the articles purchased and didn't state how he knew it to be Marihuana but just stated a conclusion which should have been stricken.

As to the second assignment of error that deals with the motion to strike the testimony of Mr. Love. He stated on cross-examination that he did not use Marihuana, that he had never smoked a Marihuana Cigarette (Tr. 22). Surely then the Court should have stricken his testimony because it is obvious that the Government did not prove any fact that would qualify this witness on the matter of Marihuana. The Court stated that he sustained the objections of Counsel when made but even though that may have been done, to continue to allow the witness to testify

about Marihuana, until qualified so to do, was the most apparent type of error. The Government argues that he (the witness Love) referred to "sticks" and not to Marihuana. The Court may read the record (Tr. 21-22) and see that the witness said "Davidson came to me and said Chester Banks sent him to get some Marihuana. I gave it to him and I had gotten it from Chester Banks." The "it" modified the Marihuana used in the previous sentence and it is facetious to argue that the witness, the Jury and everybody in the Court room didn't know just exactly what he meant. Only the Government attorney meant "sticks" it is argued. The failure to strike this testimony was error and highly prejudicial to the Defendant.

ARGUMENT ON ASSIGNMENT OF ERROR II

This assignment of error deals with the question as to whether or not there was sufficient evidence on Counts I, II, and III to present the case to the Jury.

The Court's attention is called to the fact that the physical evidence was not introduced in the trial. If the defendant was a dealer in Marihuana as is claimed by the Government, could not they have had a Government agent make a purchase and preserve the evidence for the jury? The evidence is that a man was arrested in February of

1944 for stealing a coat and jacket (Tr. 20) and he told the officers that he had some Marihuana in his room. Not that he had purchased this Marihuana from the defendant but he told the officers that he had purchased from the Defendant in September of 1943, when he had been drinking. Then the theft case was dropped and this witness became the Government's case against the defendant. He was a law violator in many respects. He was charged with possession of Marihuana, and was not sentenced at the time of his giving of the testimony. He had discussed the matter with the Government agents. All of these circumstances, the previous deal with the officers on the dismissal of the theft case, the inference that may logically be drawn that he was to be "taken care of" on his decision to plead guilty, all are facts which color his testimony to the extent that the Court should not have allowed it, not substantiated, to go to the jury.

The other witness didn't know what Marihuana was. Never used or smoked it and obviously wasn't qualified to testify concerning it. His testimony was biased by the fact that he had, according to his own admission, had a fight with the defendant. He had borrowed \$125.00 from the defendant to get out of jail and he had never paid it back. "I hit him on the head which I had to do to stop

the fight and from that day to this we haven't spoken." (Tr. 23).

The source of all the evidence introduced was polluted by coming from the mouths of two confessed law violators both of whom "had their own ax to grind" and one of whom had had a violent quarrel with the defendant. Surely one's freedom should not be removed by evidence as unconvincing as this. The Court should have granted the defendant's motion for a directed verdict at the conclusion of the Government's case.

ASSIGNMENT OF ERROR IV, V AND VI

After the defendant testified, I think then the Court should have dismissed the action and sustained the motions.

The defendant operated a tavern in the colored district in Seattle. He had never been bothered or molested with reference to Marihuana. He did not use Marihuana or sell it or have it in his possession. The evidence shows there were raids in the district for Marihuana and many people were arrested in February, 1944. The defendant was not arrested until March, a month after Townsend was arrested and after Love was arrested.

Again it is urged that nowhere in the record is there any evidence of a substantial nature. It is urged that the entire evidence was too weak to have been submitted to the jury.

The meager evidence coming from a polluted source and from witnesses who have experienced antagonism toward the defendant, one witness an addict, the other a man who had hit the defendant with an ax, only creates in this writer's mind, as it must in this Court's, a suspicion.

This Circuit has already held that unless the evidence excludes all reasonable theory of the defendant's innocence the case should be reversed.

Lempie vs. U. S., 39 Fed. (2nd) 19;

Benn vs. U. S., 21 Fed. (2nd) 962;

Harling vs. U. S., 13 Fed. (2nd) 114;

DeLuca vs. U. S., 298 Fed. 412.

DeVilla vs. U. S., 294 Fed. 535.

Every other hypotheses but that of guilt was not excluded by the evidence.

The following is taken from *Salinger vs. U. S.*, 23 Fed. (2nd) 48:

"Unless there is substantial evidence of facts which

exclude every other hypotheses but that of guilt, it is the duty of the trial Judge to instruct the Jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the Court to reverse the Judgment against the accused."

Union Pacific Coal Co. vs. U. S., 173 Fed. 737.

Vernon vs. U. S., 146 Fed. 121;

Nosowitz vs. U. S., 282 Fed. 578;

Sullivan vs. U. S., 283 Fed. 865;

Siden vs. U. S., 9 Fed. (2nd) 241;

Van Gorder vs. U. S., 21 Fed. (2nd) 939.

ARGUMENT ON ASSIGNMENT OF ERROR V AND VI

It is respectfully urged that the same argument advanced in the previous assignment of errors apply to assignment of error V and VI.

CONCLUSION

It is respectfully urged that the Court should have granted the motions for a directed verdict and the challenge to the legal sufficiency of the evidence and that the motion for a new trial should have been granted for the error in not striking the testimony of the witnesses who were not qualified to testify.

Respectfully submitted,

JEFFREY HEIMAN.



No. 10804

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CHESTER BANKS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

FILED

DEC - 1 1944

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HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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IN THE
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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The defendant was indicted in three counts of the indictment. The first two counts accused the defendant of transferring marihuana cigarettes not in pursuance of a written order of the person to whom such marihuana was transferred, and not on a form issued in blank for that purpose by the Secretary of

the Treasury. The third and last count accuses the defendant of having possession of marihuana cigarettes not in pursuance of a written order form and without having registered and paid the special tax as required and imposed by law.

The jury returned a verdict of guilty on all three counts.

A motion for new trial was duly made (Tr. 5) and denied by the Court (Tr. 6). Judgment and sentence was entered and the defendant was sentenced to two years in the Penitentiary on Count I of the Indictment and two years on Count II of the Indictment. The sentence on Count II to run concurrently to the execution of the sentence on Count I of the Indictment. Imposition of sentence was suspended on Count III of the Indictment for a period of one year from the expiration of the sentence on Counts I and II of the Indictment (Tr. 8).

From this Judgment and Sentence this appeal is prosecuted.

There are actually three questions presented in the Brief of Appellant and set out as six assignments of error. These assignments of error can briefly be stated as follows:

QUESTIONS PRESENTED

The first question presented is whether or not the Court was correct in overruling the objection that the testimony of the witness Townsend Davidson should be stricken on the grounds that the witness was not an expert.

The second question presented is whether or not the Court was correct in failing to strike the testimony of witness Leonard Love upon motion of the defendant's counsel after the Government has rested its case and counsel for the defendant was in the midst of argument on a motion for a directed verdict.

The third question is whether or not there was sufficient evidence to go to the jury.

ARGUMENT ON FIRST QUESTION

The fact that the witness Davidson was a smoker of marihuana for ten or twelve years, his testimony as to the nature of the substance with which he was familiar was sufficient to require the submission of the question of whether or not the substance was marihuana to the jury as a question of fact. The witness possessed greater knowledge than the jury as to the fact that it was marihuana, and therefore, his testimony was of assistance to them. The qualification

to express an opinion that it was marihuana was gained from his long use of it, and in Davidson's testimony, he stated that he, Chester Banks, the defendant, and another person smoked marihuana together in Davidson's automobile (Tr. 17-18).

Pennachio v. United States, 263 Fed. 66.

The testimony of a user of marihuana for ten or twelve years, who has been charged by the Government with possession of marihuana and who has stated that he expects to plead guilty, (Tr. 20) and who smoked marihuana with the defendant Banks is sufficient to be of assistance to a jury as to whether or not the substance was marihuana.

ARGUMENT ON SECOND QUESTION

The testimony of the witness Leonard Love (Tr. 21-22) which is in point in this question is found in the testimony as to a conversation in which the word marihuana was used. The word marihuana was never used after that on direct examination. There was no objection then made to any of the testimony at the time. Here the witness Love had pleaded guilty to a marihuana charge and testified that he was an agent for the defendant Banks. The Court at all times sustained objections made by counsel for the defendant when made at the proper time.

The motion to strike the testimony of the witness Love, even if it were well taken, which fact is denied, but coming after the close of the Government's case and after a motion for a directed verdict, comes too late.

Clark v. United States, 245 Fed. 112;
Alvarado v. United States, 9 F. (2d) 385.

Whether a motion to strike out evidence admitted without objection shall be granted or refused generally rests in the sound discretion of the Court.

New York Life Ins. Co. v. Rees, 19 F. (2d) 781.

A motion made, after the evidence is admitted or the question answered, to strike it out may properly be denied, if the answer is responsive to the question, especially when the character of the evidence is apparent at the time of its admission and no reason is shown for not interposing the objection at the time the evidence was offered.

The evidence given by the witness Love was also corroborative of the testimony given by the witness Davidson. This view of the evidence was taken by the Trial Court as shown by the Trial Court's statement in the absence of the jury (Tr. 27).

We wish to urge that the testimony of the witness Love, being corroborative, placed the burden on

the appellant to show that any alleged error was prejudicial to him to the extent that on the whole record his substantial rights have been denied.

Berger v. United States, 295 U.S. 78;
Marino v. United States, 91 F. (2d) 691;
Coplin v. United States, 88 F. (2d) 652.

ARGUMENT ON THIRD QUESTION

The entire argument of the appellant as to the sufficiency of the evidence to go to the jury rests on the fact that the two witnesses were law violators themselves and, therefore, their testimony may be said to come from a polluted source.

Many times to get facts on the violations of a so-called "source" in narcotic cases, it is necessary to get evidence from known violators since these so-called "sources" do not make direct retail sales.

In the case at bar, the Court had the witnesses before it, heard their testimony and could study their demeanor on the witness stand. In the Court's opinion, their testimony was sufficient to go to the jury.

The argument of the appellant with quotations from *Salinger vs. United States*, 23 F. (2d) 48, and other cases listed on Page 11 of Appellant's Brief are not relevant here because the testimony in the case

at bar is clear and direct if the two Government witnesses are believed by the jury, and the evidence is not circumstantial as in the cases cited. If the witnesses in the case at bar are believed, there is no other hypothesis but that of guilt.

The objections made by the Appellant to the testimony only goes to the weight of such testimony since as Appellant claims, the testimony is from known law violators.

OTHER ASSIGNMENTS OF ERROR

The well settled law as to any other questions raised by Appellant's Brief in the Assignments of Error shows that such assignments are without merit. As to error in not granting the Motion for New Trial, it is well established that such an assignment is not reviewable.

McDonough v. United States, 299 Fed. 30;
Sutton v. United States, 79 F. (2d) 863;
Utley v. United States, 115 F. (2d) 117.

There was no error in failure to sustain the defendant's challenge to the legal sufficiency of the evidence and the defendant proceeded to introduce evidence on behalf of the defendant.

Clark v. United States, 245 Fed. 112.

CONCLUSION

It is respectfully submitted that the Trial Court acted correctly in denying the motions for a directed verdict and the challenge to the legal sufficiency of the evidence and that the motion for a new trial should not have been granted since there was no error, therefore, the Judgment should be affirmed.

J. CHARLES DENNIS

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No. 10901

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

SANDEN AND FERGUSON COMPANY, a
Montana Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

DEC 22 1944

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[1*]

In the District Court of the United States
In and For the District of Montana

No. 173

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

SANDEN AND FERGUSON COMPANY, a
Montana Corporation,

Defendant.

Be it remembered that on July 13, 1943, the
complaint of the plaintiff was filed herein in the
words and figures following, to-wit: [2]

In the District Court of the United States
for the District of Montana

PRENTISS M. BROWN, Administrator, Office
of Price Administration,

Plaintiff,

vs.

SANDEN AND FERGUSON COMPANY, a
Montana Corporation,

Defendant.

COMPLAINT

I.

In the judgment of plaintiff, Prentiss M. Brown,
Administrator, Office of Price Administration, de-

defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong. 2nd Sess., 56 Stat. 23; 50 U.S.C.A. §§ 901-946) as amended (Pub. L. 729, 77th Cong., 2nd Sess. c. 578; 56 Stat.), hereinafter called the "Act," in that it has violated the General Maximum Price Regulation issued pursuant to Sections 2(a) and 202(b) of the "Act."

II.

Plaintiff brings this proceeding for an order suspending the license of the defendant pursuant to the provisions of Section 205(f)(2) of the "Act", and, in the alternative, pursuant to the provisions of Section 205(a) of the "Act" to enforce compliance with said Section 4(a) of the "Act" and to permanently enjoin and restrain defendant, its agents, servants, employees, and all persons in active concert or participation with it, from selling, delivering, or offering for sale or delivery, any commodity in violation of the General Maximum Price Regulation, as heretofore or hereafter amended or revised, and doing, attempting, or agreeing to anything in violation thereof, or in violation of any regulation adopted pursuant to said Sections 2(a) and 202(b) of the "Act."

III.

Jurisdiction of this proceeding is conferred upon this Court by [3] Sections 205(c) and 205(f)(2) of the "Act."

IV.

Defendant's gross sales, at all times material hereto, have exceeded the sum of \$100,000 per year.

V.

At all times pertinent hereto there has been in effect, pursuant to Sections 2(a) and 202(b) of the "Act", the General Maximum Price Regulation (7 F.R. 3153). Said General Maximum Price Regulation established maximum prices for commodities regulated thereby, and provided that no person should sell or deliver any commodity at a price higher than the maximum price established by the Regulation.

VI.

By the provisions of Section 16 of said Regulation, every person selling at wholesale or retail, any commodity for which a maximum price is established by said Regulation, or by any other price regulation of the Office of Price Administration making applicable the provisions of said Section 16, was granted a license as a condition of selling such commodity.

VII.

Defendant at all times material hereto has operated a store at 111 North Main Street, Helena, Montana and has sold, and is now selling at retail from said store, yard goods, wearing apparel, sheets, pillow cases, towels, bias tape, overalls, diapers, mattresses, and other commodities, for which maximum prices are established by the General Maximum Price Regulation and other Price Regulations

of the Office of Price Administration. By the provisions of Section 16 of said General Maximum Price Regulation, defendant was granted a license as a condition of selling at retail such commodities.

VIII.

On or about January 14, 1943, a warning notice was sent by registered mail to the defendant pursuant to the provisions of Section 205(f)(2) of the "Act", and was received by defendant on or about January 16, 1943. A copy of said warning notice is attached hereto, made a part hereof, and marked [4] "Exhibit A." Said warning notice warned the defendant that if, after receipt thereof, the defendant violated any of the provisions of said license or the provisions of any regulation, schedule, order, or requirement with respect to which said license is applicable, proceedings would be instituted for an order suspending said license, all as more fully appears from said Exhibit.

IX.

The General Maximum Price Regulation provides among other things, as follows:

Section 1499.1 Prohibition Against Dealing in Commodities or Services Above Maximum Prices:

On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price per-

mitted by this General Maximum Price Regulation: * * * * *

Section 1499.2 Maximum Prices for Commodities and Services: General Provisions:

Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

- (1) For the same commodity or service; or
- (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942 by the most closely competitive seller of the same class:

- (1) For the same commodity or service; or
- (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

Highest Price Charged During March, 1942:

For the purposes of this General Maximum Price Regulation, the highest [5] price charged by a seller during March, 1942 shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March, 1942 to a purchaser of the same class; or

(b) If the seller made no such delivery or supplied no such service during March, 1942, his high-

est offering price for delivery or supply during that month to a purchaser of the same class; or

(c) If the seller made no such delivery or supplied no such service and had no such offering price to a purchaser of the same class, the highest price charged by the seller during March, 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers: * * * * *

X.

The General Maximum Price Regulation provides among other things, as follows:

Section 1499.11 Base-Period Records:

Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

- (1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March, 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and
- (2) All his customary allowances, discounts, and other price differentials. * * * * *

XI.

The General Maximum Price Regulation provides among other things, [6] as follows:

Section 1499.12 Current Records:

Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

XII.

The General Maximum Price Regulation provides among other things, as follows:

Section 1499.13 Maximum Prices of Cost-of-living Commodities: Statement, Marking or Posting.

For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in Section 1499.25, Appendix B, of this General Maximum Price Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail

shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale: Provided, That whichever of the above methods of posting is adopted, the maximum price of each commodity offered for sale shall be plainly visible to the purchaser at the place in the business establishment where the commodity is offered for sale, and shall not be obscured by the posted price of other commodities, whether by use of price books or catalogs or layers of price lists or other- [7] wise or in any other manner. The maximum price shall be stated as follows: "Ceiling Price \$....;" or "Our Ceiling \$....." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in Appendix B, shall post the maximum price by price-line at the place in the business establishment where the commodities in such price-line are offered for sale, and, in addition, shall mark the selling price of each such commodity on the commodity itself. * * *

(b) On or before July 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate de-

scription or identification of it. Such statement shall be kept up to date by such person by filing on the tenth day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity. * * * * *

XIII.

After receipt of said warning notice, the defendant violated the provisions of the General Maximum Price Regulation and the license granted by it under Section 16 thereof in the following particulars:

a. That the defendant subsequent to the receipt by it of such warning notice and on or about February 1, 1943, prepared a purported base period statement as required by Section 1499.11(b) of said regulation, but that such statement was defective in that the defendant failed, neglected and refused to list therein all of the commodities it sold, or offered for sale during March, 1942, with the maximum prices thereof; that it was further defective in that the description of certain articles listed therein is so indefinite, uncertain and confused, that it is impossible to determine what articles are priced or the price thereof; that the said Base Period Statement does not contain an appropriate description or identification of many of the commodities listed thereon;

b. That on or about February 1, 1943, the defendant filed with War Price and Rationing Board

5-1, Helena, Montana a purported Cost-of-Living Commodity Statement as required by Section 1499.13(b) of said regulation, but that the description of certain commodities listed therein is so uncertain, vague, indefinite, and confusing that it is impossible to determine what articles are priced or the prices therefor; that said Cost-of-Living Commodity Statement does not contain appropriate description or identification of the articles listed thereon; that the said Cost-of-Living Commodity Statement is further incomplete and defective in that the defendant is offering for sale many Cost-of-Living Commodities which are not listed in the said Cost-of-Living Commodity Statement; that no supplements to said Cost-of-Living Commodity Statement have been filed.

c. That between the dates of March 23 to March 31, 1943, the defendant offered for sale the following Cost-of-Living Commodities, to-wit:

 Ticking, Indian Head, Jersey, Sharkskin, all which are yard goods, and cotton bedspreads, overalls, sheets, women's and girls' dresses, women's skirts, children's gloves and children's hosiery,

and at the same time failed to post or display the maximum prices or the ceiling prices therefor;

d.(1) That during the month of March, 1942 the highest price at which the defendant sold or offered for sale, gingham, a yard goods, was the sum of thirty-five cents (35c) per yard; that during February and March, 1943, the defendant sold and

offered for sale gingham, a yard goods, at thirty-nine cents (39c) per yard, such price being in excess of the highest price charged in March, 1942, thereby violating Sections 1499.1 and 1499.2 of the General [9] Maximum Price Regulation and the provisions of the "Act."

d.(2) That the highest price at which the defendant sold, or offered for sale, gingham, a yard goods, during the month of March, 1942, was the sum of thirty-five cents (35c) per yard; that notwithstanding that such was the highest price charged for gingham during March, 1942, and the defendant's maximum price therefor, the defendant stated in its Base Period and Cost-of-Living Commodity Statements that the maximum price for gingham was thirty-nine cents (39c) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum price for gingham, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation, and contrary to the provisions of Section 202(b) of the "Act."

d.(3) In the alternative to d(1) and d(2) supra, the defendant sold, or offered for sale, during the month of March, 1942, kinds, qualities, or widths of gingham at prices lower than thirty-nine cents (39c) per yard and failed, neglected, and refused to include the less expensive kinds, qualities, and widths of gingham in its Base Period Statement in violation of Section 1499.11 of the said General Maximum Price Regulation and the "Act."

e.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, denim, a yard goods, was the sum of thirty-nine cents (39c) per yard; that during February and March, 1943, the defendant sold, and offered for sale, denim, a yard goods, at forty-five cents (45c) per yard, such price being in excess of the highest price charged for said denim in March, 1942; and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

e.(2) That the highest price at which the defendant sold, or offered [10] for sale, denim, a yard goods, in the month of March, 1942 was the sum of thirty-nine cents (39c) per yard; that notwithstanding that thirty-nine cents (39c) per yard was the highest price charged for denim during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated on its Base Period Statement and Cost-of-Living Commodity Statement that the highest maximum price for denim was forty-five cents (45c) per yard and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements and maximum price for denim, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and contrary to provisions of Section 202(b) of the "Act."

e.(3) In the alternative to e(1) and e(2) supra, the defendant sold, or offered for sale, during the Month of March, 1942, kinds, qualities, or widths

of denim at prices other than thirty-five cents (35c) and forty-five cents (45c) per yard, the prices shown on the Base Period and Cost-of-Living Commodity Statements, and failed, neglected, and refused to include the other kinds, qualities, and widths of denim in its Base Period Statement in violation of Section 1499.11 of the General Maximum Price Regulation and the "Act."

f.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, challis, a yard goods, was the sum of twenty-five cents (25c) per yard; that during the month of March, 1943, the defendant offered for sale, challis, a yard goods, at thirty-two cents (32c) per yard, such price being in excess of the highest price charged for said challis, yard goods, in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

f.(2) That the highest price at which the defendant sold, or offered [11] for sale, challis, a yard goods, in the month of March, 1942, was the sum of twenty-five cents (25c) per yard; that notwithstanding that twenty-five cents (25c) per yard was the highest price charged for challis during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated on its Base Period Statement and Cost-of-Living Commodity Statement that the maximum price for challis was thirty-two cents (32c) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maxi-

mun price for challis, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and Section 202(b) of the Emergency Price Control Act.

f.(3) In the alternative to f(1) and f(2) *supra*, the defendant sold, or offered for sale, during the month of March, 1942, kinds, qualities, and widths of challis at prices lower than thirty-two cents (32c) per yard, the only price shown in the Base Period and Cost-of-Living Commodity Statements, and failed, neglected, and refused to include the less expensive kinds, qualities, and widths of challis in its Base Period Statement in violation of Section 1499.11 of the General Maximum Price Regulation.

g.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, spun rayon, a yard goods, was the sum of seventy-nine cents (79c) per yard; that during the months of February and March, 1943, the defendant sold, and offered for sale, spun rayon at eighty-nine cents (89c) per yard, such price being in excess of the highest price charged for said spun rayon in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

h.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, eylette, a [12] yard goods, was the sum of seventy-nine cents (79c) per yard; that during the month of February, 1943, the defendant sold, or offered for sale, eylette, a yard goods, for the

sum of One Dollar Nineteen Cents (\$1.19) per yard, such price being in excess of the highest price charged for said eylette during the month of March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

h.(2) That the highest price at which the defendant sold, or offered for sale, eylette, a yard goods, in the month of March, 1942 was the sum of seventy-nine cents (79c) per yard; that notwithstanding that seventy-nine cents (79c) per yard was the highest price charged for eylette, yard goods, during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated on its Base Period Statement and Cost-of-Living Commodity Statement that the maximum price for eylette was the sum of One Dollar (\$1.00) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum price for eylette, yard goods, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and contrary to the provisions of Section 202(b) of the Emergency Price Control Act.

h.(3) In the alternative to h(1) and h(2) supra, the defendant sold, or offered for sale, during the month of March, 1942, kinds, qualities, or widths of eylette, yard goods, at prices other than One Dollar (\$1.00) per yard, and failed, neglected, and refused to include the other kinds, qualities, and widths of eylette, yard goods, in its Base Period Statement in

violation of Section 1499.11 of the General Maximum [13] Price Regulation.

i.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, gabardine, a yard goods, was the sum of eighty-five cents (85c) per yard; that during the month of February, 1943, the defendant sold gabardine, a yard goods, at One Dollar (\$1.00), One Dollar Nineteen Cents (\$1.19) and One Dollar Thirty-nine Cents (\$1.39) per yard, such prices being in excess of the highest price charged for such gabardine yard goods in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

i.(2) That the highest price at which the defendant sold, or offered for sale, gabardine yard goods, in the month of March, 1942, was the sum of eighty-five cents (85c) per yard; that notwithstanding that eighty-five cents (85c) per yard was the highest price charged for gabardine yard goods during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated in its Base Period Statement and Cost-of-Living Commodity Statement that the price for gabardine yard goods was eighty-nine cents (89c) per yard and One Dollar Nineteen Cents (\$1.19) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum price for gabardine yard goods, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and con-

trary to the provisions of Section 202(b) of the Emergency Price Control Act.

i.(3) In the alternative to i(1) and i(2), *supra*, the defendant sold, or offered for sale, during the month of March, 1942, kinds, qualities, or widths of gabardine yard goods at prices other than eighty-nine cents (89c) per yard and One Dollar Nineteen Cents (\$1.19) per yard, the prices shown on the Base Period and Cost-of-Living Commodity Statements, and [14] failed, neglected, and refused to include the other kinds, qualities, and widths of gabardine yard goods in its Base Period Statement in violation of Section 1499.1 of the General Maximum Price Regulation and the "Act."

j.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, Jersey, a yard goods, was One Dollar Sixty-five Cents (\$1.65) per yard; that during the month of February, 1943, the defendant sold, and offered for sale, Jersey, a yard goods, at the price of One Dollar Sixty-nine Cents (\$1.69) per yard, such price being in excess of the highest price charged for said Jersey yard goods in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

k.(1) That the highest maximum price at which defendant listed overalls in its Base Period and Cost-of-Living Commodity Statements was the sum of Two Dollars Fifty Cents (\$2.50) per pair; that during the month of February, 1943, the defendant sold, and offered for sale, overalls at Three Dollars

(\$3.00) per pair, such price being in excess of the highest price permitted to be charged for overalls, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

k.(2) In the alternative to k(1), the defendant sold, or offered for sale, kinds, qualities, or sizes of overalls other than the kinds, qualities, and sizes of overalls listed in its Cost-of-Living Commodity, and failed, neglected, and refused to include said other kinds, qualities, and sizes of overalls in its Cost-of-Living Commodity Statement in violation of Section 1499.13 of the General Maximum Price Regulation and [15] the "Act."

l.(1) During the month of March, 1942, the highest price at which the defendant sold, or offered for sale, Indian Head, a yard goods, was the sum of thirty-nine cents (39c) per yard; that during the month of February, 1943, the defendant sold, and offered for sale, Indian Head, a yard goods, for fifty cents (50c) per yard, and fifty-nine cents (59c) per yard, such prices being in excess of the highest price charged for said Indian Head, a yard goods, in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation.

l.(2) That the highest price at which the defendant sold, or offered for sale, Indian Head, a yard goods, in the month of March, 1942 was the sum of thirty-nine cents (39c) per yard; that notwithstanding that thirty-nine cents (39c) per yard was the highest price charged for Indian Head dur-

ing the month of March, 1942, and the defendant's maximum price therefor, the defendant stated in its Base Period Statement and Cost-of-Living Commodity Statement that the maximum prices for Indian Head were, Butler Brothers, 44-inch, forty-nine cents (49c); Butler Brothers, White, 54-inch, fifty-nine cents (59c), and Carson, Pirie, Scott, Colored Indian Head, fifty cents (50c) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum prices for Indian Head yard goods, contrary to Sections 1499.1 and 1499.13 of the General Maximum Price Regulation, and contrary to the provisions of Section 202(b) of the "Act."

l.(3) In the alternative to l(1) and l(2), supra, the defendant sold, or offered for sale, during the month of March, 1942, kinds, qualities, and widths of Indian Head at prices other [16] than forty-nine cents (49c), fifty-nine cents (59c), and fifty cents (50c) per yard, the prices shown on the Base Period Statement, and failed, neglected, and refused to include said other kinds, qualities, and widths of Indian Head in its Base Period Statement in violation of Section 1499.1 of the General Maximum Price Regulation and the "Act."

m.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, percale, a yard goods, was the sum of twenty-nine cents (29c) per yard; that during the month of February, 1943, the defendant sold, and offered for sale, percale yard goods at the price

of thirty-five cents (35c) and thirty-three cents (33c) per yard, such price being in excess of the highest price charged for said percale yard goods in March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

m.(2) That the highest price at which the defendant sold, or offered for sale, percale yard goods in the month of March, 1942, was the sum of twenty-nine cents (29c) per yard; that notwithstanding that twenty-nine cents (29c) per yard was the highest price charged for percale, a yard goods, during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated in its Base Period and Cost-of-Living Commodity Statements that the maximum price for percale, a yard goods, was thirty-five cents (35c) per yard, and that the defendant thereby falsely listed in its Base Period and Cost-of-Living Commodity Statements the maximum price for percale, a yard goods, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and contrary to the provisions of Section 202(b) of the Emergency [17] Price Control Act.

m.(3) In the alternative to m.(1) and m.(2), *supra*, the defendant sold, or offered for sale during the month of March, 1942, kinds, qualities, or widths of percale at prices lower than thirty-five cents (35c) per yard, and failed, neglected, and refused to include the less expensive kinds, qualities, and widths of percale yard goods in its Base Period Statement in violation of Section 1499.1 of the Gen-

eral Maximum Price Regulation and the "Act."

n.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, diapers was the sum of Two Dollars Fifty Cents (\$2.50) per dozen; that during the month of February, 1943, the defendant sold, and offered for sale, diapers at Two Dollars Seventy-five Cents (\$2.75) per dozen, such price being in excess of the highest price charged for said diapers in the month of March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

n.(2) That the highest price at which the defendant sold, or offered for sale, diapers, in the month of March, 1942, was the sum of Two Dollars Fifty Cents (\$2.50) per dozen; that notwithstanding that Two Dollars Fifty Cents (\$2.50) per dozen was the highest price charged for diapers during the month of March, 1942, and the defendant's maximum price therefor, the defendant listed in its Base Period and Cost-of-Living Commodity Statements a highest maximum price for diapers of Two Dollars Seventy-five Cents (2.75) per dozen, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum price for diapers, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and contrary to the provisions of Section 202(b) of the "Act." [18]

n.(3) In the alternative to n(1) and n(2), *supra*, the defendant sold, and offered for sale, during the month of March, 1942, kinds, qualities, and sizes of

diapers at prices other than One Dollar Ninety-five Cents (\$1.95), Two Dollars Twenty-five Cents (\$2.25), and Two Dollars Seventy-five Cents (\$2.75) per dozen, the prices shown in the Base Period and Cost-of-Living Commodity Statements, and failed, neglected, and refused to include such other kinds, qualities, and sizes of diapers in its Base Period Statement in violation of Section 1499.11 of the General Maximum Price Regulation.

p.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, burlap yard goods, was the sum of twenty-nine cents (29c) per yard; that during the month of March, 1943 the defendant offered for sale the same kind and quality of burlap at a price of forty-five cents (45c) per yard, such price being in excess of the highest price charged for such burlap during the month of March, 1942, and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

p.(2) That the highest price at which the defendant sold, or offered for sale, burlap yard goods during the month of March, 1942, was the sum of twenty-nine cents (29c) per yard; that notwithstanding that twenty-nine cents (29c) per yard was the highest price charged for burlap during the month of March, 1942, and the defendant's maximum price therefor, the defendant stated in its Base Period Statement that the maximum price for burlap was forty-five cents (45c) per yard, and that the defendant thereby falsely represented in its Base Period Statement the maximum price for burlap, **contrary**

to Section 1499.11 of the General Maximum Price Regulation and contrary to the provisions of Section 202(b) of the "Act."

p.(3) In the alternative to p(1) and p(2), *supra*, the defendant sold, [19] or offered for sale, during the month of March, 1942, kinds, qualities, and widths of burlap at prices lower than forty-five cents (45c) per yard, the price shown in the Base Period Statement, and failed, neglected, and refused to include the less expensive kinds, qualities, and widths of burlap in its Base Period Statement in violation of Section 1499.11 of the General Maximum Price Regulation.

q.(1) That the highest price charged for sateen, a yard goods, during the month of March, 1942, was the sum of forty-five cents (45c) per yard; that during the month of February, 1943 the defendant sold, or offered for sale, sateen, a yard goods, at fifty-nine cents (59c) per yard, such price being in excess of the highest price charged for sateen, a yard goods, during the month of March, 1942; and that the defendant thereby violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

r.(1) That during the month of March, 1942, the highest price at which the defendant sold, or offered for sale, ticking, a yard goods, was the sum of fifty cents (50c) per yard; that during the month of February, 1943, the defendant sold ticking at the prices of sixty-five cents (65c) and sixty-nine cents (69c) per yard, such prices being in excess of the highest price charged for said ticking during the month of March, 1942, and that the defendant there-

by violated Sections 1499.1 and 1499.2 of the General Maximum Price Regulation and the "Act."

r.(2) That the highest price at which the defendant sold, or offered for sale, ticking, a yard goods, during the month of March, 1942, was the sum of Fifty cents (50c) per yard; that notwithstanding that fifty cents (50c) per yard was the highest price charged for ticking during the month of March, 1942, and the defendant's maximum price therefor, [20] the defendant stated in its Base Period Statement and Cost-of-Living Commodity Statement that the highest maximum price for ticking was sixty-nine cents (69c) per yard, and that the defendant thereby falsely represented in its Base Period and Cost-of-Living Commodity Statements the maximum price for some kinds, qualities, or widths of ticking, contrary to Sections 1499.11 and 1499.13 of the General Maximum Price Regulation and contrary to the provisions of Section 202(b) of the "Act."

r.(3) In the alternative to r(1) and r(2), supra, the defendant, during the month of March, 1942, sold, or offered for sale, kinds, qualities, and widths of ticking at prices other than thirty-five cents (35c), sixty-five cents (65c), and sixty-nine cents (69c) per yard, the prices shown in the Cost-of-Living Commodity Statement and Base Period Statement, and failed, neglected, and refused to include said other kinds, qualities, and widths of ticking in its Base Period Statement in violation of Section 1499.11 of the General Maximum Price Regulation and the "Act."

XIV.

Plaintiff alleges on information and belief that since the 18th day of May, 1942, defendant has sold, and offered for sale, commodities, for which maximum selling prices are established by the General Maximum Price Regulation, and has failed and neglected to keep records showing the basis upon which it determined the maximum selling prices of such commodities, contrary to the provisions of Section 1499.12 of the General Maximum Price Regulation and the "Act."

Wherefore, plaintiff prays judgment as follows:

1. That the license granted by Section 1499.16 of the General Maximum Price Regulation to defendant as a condition of selling at retail the commodities for which maximum prices are established by the General Maximum Price Regulation, and by other price regulations of the Office of [21] Price Administration making applicable the provisions of said Section 1499.16, be suspended for a period not to exceed twelve months.

2. That the defendant, its officers, agents, employees, and all other persons acting with or on behalf of the defendant, be enjoined from directly or indirectly selling, or offering to sell, all commodities with respect to which said license to sell is suspended, during the period of suspension.

3. That in the alternative to the relief demanded in paragraphs numbered 1. and 2. hereof, defendant, its officers, agents, employees, and all other persons acting with or on behalf of the de-

fendant, be permanently enjoined and restrained from:

(a) Selling, delivering, or offering for sale or delivery, any commodity in violation of the General Maximum Price Regulation, as heretofore or hereafter amended or revised, and attempting or agreeing to anything in violation thereof, or in violation of any regulation adopted pursuant to said Section 2(a) of the "Act."

(b) Failing to mark and post the maximum prices of cost-of-living commodities sold, or offered for sale, by defendant, and from failing to keep, and file with the appropriate War Price and Rationing Board, complete and accurate records, as required by the General Maximum Price Regulation, as heretofore or hereafter amended or revised, or by any other regulation adopted pursuant to Section 202(b) of the "Act", requiring the making or keeping of records or the making of reports.

4. That an order to show cause issue herein, directed to the defendant, and requiring that it appear before this Court, on a day certain, then and there to show cause, if any it has, why an order should not be made herein enjoining and restraining defendant from committing any of the acts set forth in sub-paragraphs (a) and (b) of paragraph numbered 3. of this prayer for relief during the pendency of this action, and that upon the hearing of said order to show cause an order be made in accordance herewith. [22]

5. That plaintiff have such other and further relief as to the Court may seem equitable and just in the premises.

RUSSELL E. SMITH
WESLEY W. WERTZ
CLARENCE E. WOHL

Attorneys for Plaintiff.

Room 321, Placer Hotel, Helena, Montana. [23]

EXHIBIT "A"

Office of Price Administration
Region VII
Denver, Colorado

WARNING NOTICE

To: Sanden & Ferguson Company
111 North Main Street
Helena, Montana

By the provisions of Section 16 of the General Maximum Price Regulation you were granted a license as a condition of selling, at wholesale or retail, any commodity or commodities with respect to which such licensing provisions are applicable.

In the Judgment of the undersigned, Regional Administrator of Region VII of the Office of Price Administration:

1. You failed to prepare on or before July 1, 1942 and keep for examination a statement showing the highest prices charged by you for those commodities for which maximum prices are established by the General Maximum Price Regula-

tion and which you delivered during the month of March, 1942, and showing the prices at which you offered to deliver such commodities during that month, together with an appropriate description or identification of each such commodity, thereby violating Section 11(b) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

2. You failed to file on or before July 1, 1942, with your War Price and Rationing Board, a statement showing your maximum price for each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (b) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

3. You failed on or about December 28, 1942, to have posted or marked in your premises in a manner plainly visible to and understandable by the purchasing public, the maximum price of each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (a) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

Notice is further given if, after receipt of this warning notice, you violate any provisions of your license, or any provisions of any regulations, incidental order, or requirement with respect to which your license is applicable, proceedings may be instituted in a court of competent jurisdiction for an

order suspending your license to sell at wholesale or retail any commodities to which your license is applicable.

This warning notice is sent to you pursuant to the provisions of Section 205(f)(2) of the Emergency Price Control Act of 1942 and under the authority conferred upon the Regional Administrator by General Order No. 27 (7 F.R. 5480, 8797, 9053, and 9908).

/s/ CLEM W. COLLINS

Regional Administrator

Jan. 14, 1943

[Endorsed]: Filed July 13, 1943. [24]

Therefore, on August 2, 1943, Defendant's Motion for a More Definite Statement or Bill of Particulars, was duly filed herein, in the words and figures following, to-wit: [25]

[Title of District Court and Cause.]

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS.

Comes now the defendant above named and moves this Honorable Court that an order be made requiring the plaintiff herein to furnish the defendant a more definite statement or bill of particulars of allegations of plaintiff's complaint, for the following reasons, and upon the following grounds, to-wit:

1. That paragraph XIII, portions designated "a" and "b", on pages 6 and 7 of said Complaint is uncertain, ambiguous, indefinite, so that defendant is unable to ascertain which commodities or cost-of-living commodities said plaintiff is referring to as defendant has hundreds of commodities or cost-of-living commodities in its store; that paragraph XIII, portion designated "c" is uncertain, ambiguous, indefinite, in that the details of time, circumstances of transactions, or events alleged cannot be ascertained, or the grades or quality of the cost-of-living commodities alleged sold cannot be determined by the allegations and so defendant cannot prepare a responsive pleading or generally prepare for trial; said complaint does not show what maximum prices or ceiling prices were not displayed or posted, so defendant does not know what to look for or what to reply to in preparing pleading. [26]

2. That paragraph XIII, Subdivision "d (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said gingham, or whether said gingham was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

3. That paragraph XIII, Subdivision "d (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in

its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of gingham or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

4. That paragraph XIII, Subdivision "d (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of gingham in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision "d (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said gingham, or whether the transactions were sales or just offers of sale and what qualities or widths, or weights, or colors of gingham were sold or offered for sale in March, 1942 and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [27]

5. That paragraph XIII, Subdivision "e (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said denim, or whether said denim was sold or just offered for sale and what quality, grade, or width was sold or offered

for sale to prepare a responsive pleading or generally prepare for trial.

6. That paragraph XIII, Subdivision "e (2)" of said complaint is uncertain, ambiguous, indefinite so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of denim or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

7. That paragraph XIII, Subdivision "e (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of denim in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial: that Subdivision "e (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said denim, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of denim were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [28]

8. That paragraph XIII, Subdivision “f (1)” of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said challis, or whether said challis was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

9. That paragraph XIII, Subdivision “f (2)” of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of challis or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

10. That paragraph XIII, Subdivision “f (3)” of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of challis in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision “f (3)” is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said challis, or whether the

transactions were sales or just offers of sale and what qualities or widths or weights, or colors of challis were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [29]

11. That paragraph XIII, Subdivision "g (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said spun rayon, or whether said spun rayon was sold or just offered for sale in March, 1942 and what the prices were and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

12. That paragraph XIII, Subdivision "h (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said eyette, or whether said eyette was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

13. That paragraph XIII, Subdivision "h (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kinds

of eylette or stock on hand at time *or* preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

14. That paragraph XIII, Subdivision "h (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of eylette in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision [30] "h (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said eylette, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of eylette were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial.

15. That paragraph XIII, Subdivision "i (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said gabardine, or whether said gabardine was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

16. That paragraph XIII, Subdivision "i (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of gabardine or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

17. That paragraph XIII, Subdivision "i (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of gabardine in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision [31] "i (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said gabardine, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of gabardine were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial.

18. That paragraph XIII, Subdivision "j (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details

of time, circumstances of transactions or events, or names of purchasers of said jersey, or whether said jersey was sold or just offered for sale in March, 1942 and what the prices were and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

19. That paragraph XIII, Subdivision "k (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said overalls, or whether said overalls were sold or just offered for sale and what qualities, kinds, or grades, or sizes were sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

20. That paragraph XIII, Subdivision "k (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or sizes or kinds of overalls or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial. [32]

21. That paragraph XIII, Subdivision "l (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said Indian Head, or

whether said Indian Head was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

22. That paragraph XIII, Subdivision "1 (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of Indian Head or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

23. That paragraph XIII, Subdivision "1 (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of Indian Head in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision "1 (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said Indian Head, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of Indian Head were sold or offered for sale in March, 1942, and what the prices

were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [33]

24. That paragraph XIII, Subdivision "m (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said percale, or whether said percale was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

25. That paragraph XIII, Subdivision "m (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of percale or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

26. That paragraph XIII, Subdivision "m (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of percale in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Sub-

division "m (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said percale, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of percale were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [34]

27. That paragraph XIII, Subdivision "n (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said diapers, or whether said diapers were sold or just offered for sale and what quality, grade, kind or sizes were sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

28. That paragraph XIII, Subdivision "n (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or sizes or kind of diapers or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

29. That paragraph XIII, Subdivision "n (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and sizes of diapers in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision "n (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said diapers, or whether the transactions were sales or just offers of sale and what qualities or sizes or weights, or kinds of diapers were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [35]

30. That paragraph XIII, Subdivision "p (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said burlap, or whether said burlap was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

31. That paragraph XIII, Subdivision "p (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its

Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of burlap or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

32. That paragraph XIII, Subdivision "p (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of burlap in its Base Period statement, so as to prepare a responsive answer or to generally prepare for trial; that Subdivision "p (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said burlap, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of burlap were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial. [36]

33. That paragraph XIII, Subdivision "q (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said sateen, or whether said sateen was sold or just offered for sale in March,

1942 and what the prices were and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

34. That paragraph XIII, Subdivision "r (1)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the details of time, circumstances of transactions or events, or names of purchasers of said ticking, or whether said ticking was sold or just offered for sale and what quality, grade, or width was sold or offered for sale to prepare a responsive pleading or generally prepare for trial.

35. That paragraph XIII, Subdivision "r (2)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to allegations of false representations in its Base Period and Cost-of-Living commodity statements as to the price at the time of taking inventory or filing, or as to qualities or widths or kind of ticking or stock on hand at time of preparing or filing commodity statements, so as to prepare a responsive answer or reply or to generally prepare for trial.

36. That paragraph XIII, Subdivision "r (3)" of said complaint is uncertain, ambiguous, indefinite, so that defendant cannot ascertain the particulars as to the allegations concerning failure, negligence and refusal to include the less expensive kinds, qualities and widths of ticking in its Base Period statement, so as to prepare a responsive

answer or to generally prepare for trial; that Sub division [37] "r (3)" is uncertain, ambiguous, indefinite, that the defendant cannot ascertain the details of time, circumstances of transactions, or events, or names of purchasers of said ticking, or whether the transactions were sales or just offers of sale and what qualities or widths or weights, or colors of ticking were sold or offered for sale in March, 1942, and what the prices were, so that defendant cannot prepare a responsive answer or generally prepare for trial.

37. That paragraph XIV of said complaint is uncertain, ambiguous, indefinite, as defendant is unable to tell what said allegations refer to or what commodities it refers to or what records defendant has failed or neglected to keep.

Dated this 2nd day of August, A. D., 1943.

PAUL W. SMITH
DAVID R. SMITH

.....

Attorneys for Defendant,
Helena, Montana.

Received copy of within and foregoing Motion for a More Definite Statement or Bill of Particulars, and service duly admitted this 2nd day of August, 1943.

RUSSELL E. SMITH
WESLEY W. WERTZ
CLARENCE E. WOHL

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1943. [38]

Thereafter, on November 6, 1943, Objections of Plaintiff to Defendant's Motion for a More Definite Statement or Bill of Particulars, was duly filed herein, in the words and figures following, to-wit: [39]

[Title of District Court and Cause.]

OBJECTIONS OF PLAINTIFF TO DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

Comes now the plaintiff above named and files these, his written objections to the granting of defendant's motion on file herein for a more definite statement or bill of particulars, as follows, to-wit:

1. That all of the facts and information demanded of plaintiff by defendant in its said motion are peculiarly within the knowledge of said defendant and are readily available to said defendant so that it is in no way prejudiced in preparing a responsive pleading to plaintiff's complaint or generally preparing for trial.

2. That the granting of paragraphs numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 of defendant's motion would in effect require that plaintiff elect between the alternative forms of pleading set forth in plaintiff's complaint and to which the aforesaid paragraph of defendant's motion are directed.

3. That the allegations contained in plaintiff's

complaint and to which defendant's motion is directed are not uncertain, ambiguous or indefinite.

4. That the granting of defendant's said motion would in effect require that plaintiff set forth allegations of evidence in his said complaint.

5. That plaintiff's complaint is drawn and in compliance with the [40] requirements of Rule 8 of the Federal Rules of Civil Procedure.

That the aforesaid objections are made and based upon the records and file of said cause and upon the written affidavits of Dora C. Clark, Donald I. Creel, and Clarence E. Wohl, which affidavits are attached hereto, marked Exhibits "A" and "B" respectively, and hereof made a part.

PHILIP SAVARESY

CLARENCE E. WOHL

Attorneys for Plaintiff [41]

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

State of Montana

County of Lewis and Clark—ss.

Dora C. Clark and Donald I. Creel each being first duly sworn, depose and say:

That at all of the times herein mentioned they have been, and now are, Investigators with the Office of Price Administration; that during the period from March 23, 1943, to May 14, 1943, they jointly

made an investigation of the business conducted by the Sanden and Ferguson Company, a corporation, the defendant named in the above entitled action, to determine whether said defendant was in compliance with certain regulations issued by the Office of Price Administration and affecting said defendant's business.

That said investigation included an examination of the Base Period Statement prepared by and in defendant's possession; an examination of the Cost-of-Living Commodity Statement prepared by defendant and filed by it with the Lewis and Clark County War Price and Rationing Board No. 5-1, Helena, Montana, on or about February 1, 1943, a copy of which was incorporated in the aforesaid Base Period Statement; an examination of certain sales slips in defendant's possession which were issued by said defendant during the months of March and April, 1942, and February, 1943, and evidencing sales of commodities made by defendant during said months; an examination of certain purchase invoices in defendant's possession and evidencing the purchase by defendant of [42] certain commodities during the period from September 1, 1942 to March 30, 1943; and several physical inspections of defendant's sales rooms located at 111 North Main Street, Helena, Montana.

That upon the completion of said investigation affiants compiled the information they obtained therefrom in the form of a written report and submitted the same to Messrs. Russell E. Smith and Clarence E. Wohl, two of the attorneys for the

plaintiff in the above action; that all of the information and facts compiled and set forth in said report were obtained from the examination of said Base Period and Cost-of-Living Commodity statements, said sales slips and purchase invoices, said physical inspections of said sales rooms, and from statements made to affiants by Eugene S. Sanden, vice-president of defendant, and Lois Brown and Lydia G. Clarke, two employees of defendant.

DORA C. CLARK

DONALD I. CREEL

Subscribed and sworn to before me this 4th day of September, 1943.

[Seal] CLARENCE E. WOHL

Notary Public for the State of Montana, residing at
Helena, Montana.

My commission expires January 28, 1945. [43]

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

State of Montana

County of Lewis and Clark—ss.

Clarence E. Wohl, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above action; that he assisted in the preparation of the complaint on file in said action and has

personal knowledge of the source of information from which the facts were obtained that are alleged in said complaint, and upon which said complaint is predicated.

That the facts alleged in said complaint, and upon which said complaint is predicated, were obtained from a written report of an investigation of defendant's business made by Dora C. Clark and Donald I. Creel, investigators with the Office of Price Administration, during the period from March 23, 1943 to May 14, 1943, and from an examination of the Cost-of-Living Commodity Statement filed by the defendant on or about February 1, 1943, with the Lewis and Clark County War Price and Rationing Board No. 5-1, Helena Montana.

That all of the allegations contained in paragraphs numbered XIII and XIV of plaintiff's complaint are based and predicated solely upon facts appearing in said investigators' report of their investigation of defendant's business, as aforesaid, and which said facts were learned by them from their examination of defendant's Base Period and Cost-of-Living Commodity Statements, sales slips, purchase invoices, physical inspections of defendant's sales rooms, [44] and statements made to said investigators by Eugene S. Sanden, vice-president of defendant, and Lois Brown and Lydia G. Clarke, two employees of defendant.

That all of the allegations alleged in said complaint are based upon facts which are within the knowledge of defendant.

That affiant makes this affidavit in opposition to

the motion of defendant on file herein for a more definite statement or bill of particulars.

CLARENCE E. WOHL

Subscribed and sworn to before me this 8th day of September, 1943.

[Seal] PHILIP SAVARESY

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires November 19, 1945.

Service of foregoing objections and affidavits, and receipt of true and correct copies thereof, admitted and acknowledged this 6th day of November, 1943.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant.

[Endorsed]: Filed Nov. 6, 1943. [45]

Thereafter, on November 6, 1943, Motion to Substitute Party Plaintiff was filed herein, in the words and figures following, to-wit: [46]

[Title of District Court and Cause.]

MOTION TO SUBSTITUTE
PARTY PLAINTIFF

Plaintiff moves the Court for an order substituting Chester Bowles as plaintiff herein in place of Prentiss M. Brown, Administrator, Office of Price Administration, on the ground that the term

of office of the said Prentiss M. Brown, as such Administrator, terminated on October 21, 1943; that the said Chester Bowles took office as Acting Administrator, Office of Price Administration, on October 22, 1943, and now holds such office; that there is a substantial need for continuing this action against the defendant above named as more particularly appears from the affidavit of Clarence E. Wohl attached hereto.

Dated this 6th day of November, 1943.

PHILIP SAVARESY

CLARENCE E. WOHL

Attorneys for Plaintiff. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF SUCCESSION TO OFFICE

State of Montana,

County of Lewis and Clark—ss.

Clarence E. Wohl, being first duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above entitled action; that heretofore, and during the pendency of said action, Prentiss M. Brown, Administrator, Office of Price Administration, plaintiff above named, resigned as such administrator, which said resignation became effective on October 21, 1943; that Chester Bowles was duly appointed as Acting Administrator of Office of Price Administration, and entered upon

and assumed the duties of said office on October 22, 1943, and ever since said date has been, and now is, the Acting Administrator, Office of Price Administration;

That there is substantial need for continuing and maintaining said action and obtaining an adjudication of the questions involved for the reason that in said action said defendant is charged with having violated the terms and provisions of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U.S.C.A. Sec. 901-946) as amended (Pub. L. 729, 77th Cong., 2d Sess. c. 578), and that not to continue said action would permit said defendant to engage in business practices in violation of said Act which tend toward inflation and would interfere with the United States in its war efforts and program.

CLARENCE E. WOHL

Subscribed and sworn to before me this 6th day of November, 1943.

[Seal] PHILIP SAVARESY,
Notary Public for the State of Montana, Residing
at Helena, Montana.

My Commission expires Nov. 19, 1943.

Service of the foregoing motion and receipt of true and correct copy thereof, admitted and acknowledged this 6th day of November, 1943.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant.

[Endorsed]: Filed Nov. 6, 1943. [48]

Thereafter, on November 6, 1943, Stipulation for Substitution of Party Plaintiff was filed herein, in the words and figures following, to-wit: [49]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION
OF PARTY PLAINTIFF

It Is Hereby Stipulated and Agreed, by and between the parties hereto, acting by and through their respective counsel of record, that Chester Bowles, Acting Administrator, Office of Price Administration, may be substituted in the place and stead of Prentiss M. Brown, as the plaintiff in the above entitled action, and said action may be continued and maintained by the said Chester Bowles as such Acting Administrator.

Dated this 6th day of November, 1943.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant.

PHILIP SAVARESY

CLARENCE E. WOHL

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 6, 1943. [50]

Thereafter, on November 9, 1943, an order granting plaintiff's motion to substitute party plaintiff was entered herein, the minute entry of such order being as follows, to-wit: [51]

[Title of District Court and Cause.]

This cause was duly called for hearing this day on defendant's motion for more definite statement or bill of particulars and plaintiff's objections thereto, and on plaintiff's motion to substitute party plaintiff in accordance with written stipulation on file, Mr. Clarence E. Wohl being present and appearing for the plaintiff, and Mr. Paul W. Smith being present and appearing for the defendant.

Thereupon Court ordered that plaintiff's motion to substitute party plaintiff be and is granted pursuant to stipulation on file.

Entered in open Court at Helena, Montana, November 9, 1943.

C. R. GARLOW,
Clerk. [52]

Thereafter, on December 7, 1943, the Court's Order Denying Defendant's Motion for a More Definite Statement or a Bill of Particulars, was duly filed and entered herein, in the words and figures following, to-wit: [53]

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR A MORE DEFINITE SSTATEMENT
OR A BILL OF PARTICULARS

Defendant moves "that an order be made requir-

ing the Plaintiff herein to furnish the Defendant a more definite statement or bill of particulars of allegations of Plaintiff's Complaint."

The motion does not "point out * * * the details desired" as required by Rule 12 (e) of the Federal Rules of Civil Procedure. The result is that the Court cannot determine with certainty what added information Defendant desires; and, if the motion were granted, the Plaintiff could not know definitely what added information it would be required to furnish.

It follows that Defendant's motion for a more definite statement or a bill of particulars should be and it is hereby denied in its entirety. It is further ordered that the Defendant shall have and it is hereby granted ten (10) days after service upon it of written notice of this ruling in which to serve upon the Plaintiff and file its Answer to the Complaint herein if so advised.

Done in open court at Butte, Montana, December 7, 1943.

JAMES H. BALDWIN

United States District Judge
District of Montana

[Endorsed]: Filed & Ent. Dec.7, 1943. [54]

Thereafter, on December 20, 1943, Defendant filed its Answer herein, in the words and figures following, to-wit: [55]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named, and in answer to the complaint of the plaintiff on file herein admits, denies and alleges as follows:

I.

Alleges that the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Helena, Montana.

II.

Denies each and every allegation contained in paragraph I of said complaint.

III.

Denies each and every allegation contained in paragraph II of said complaint.

IV.

Admits the allegation contained in paragraphs III and IV of said complaint.

V.

Denies each and every allegation contained in paragraph V of said complaint.

VI.

Alleges that it has not sufficient information to form a belief as to the allegations set forth in paragraph VI of said complaint, and therefore denies the same. [56]

VII.

Admits that the defendant has operated and operates a store at 111 North Main Street, Helena, Montana, is now selling at retail from said store yard goods, wearing apparel, sheets, pillow cases, towels, bias tape, overalls, diapers, mattresses and other commodities, but denies that there have been any maximum prices established on said commodities by the general maximum price regulation or any other price regulations of the Office of Price Administration; Admits that defendant was granted a license by the Office of Price Administration, but denies each and every other allegation contained in said paragraph VII.

VIII.

Admits that defendant received by registered mail the said notice set forth in paragraph VIII of said complaint, but denies that said defendant violated any of the provisions of said license or the provisions of any lawful regulation, schedule, order or requirement with respect to which said license is applicable.

IX.

Denies each and every allegation contained in paragraphs IX, X, XI and XII of said complaint, and alleges that the regulations set forth in said paragraphs do not conform to the Emergency Price Control Act of 1942 in that said regulations exceed the authority granted by said Emergency Price Control Act of 1942 as said regulations provide that no person can sell any commodity at a price higher

than a price charged by the seller for the commodity or similar commodity during March 1942 and Section 902 Tit. 50 U.S.C.A. provides that "Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act;" alleges that the purposes of the Act are defined in Section 901 Tit. 50 U.S.C.A. "To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;" alleges that said act does not provide for the defining of cost of living commodities and the filing of statements and amend- [57] ments thereto of prices and descriptions of all commodities; alleges that said regulations are contrary to the provisions of article I, paragraph I of the Constitution of the United States in that said regulations are a usurpation on the power of Congress as said regulations are illegal legislation and the Constitution of the United States provides that Congress shall have the power to legislate; alleges that said regulations are contrary to the provisions of Amendment 5 to the Constitution of the United States in that said regulations deprive defendant of liberty and property without due process of law as said defendant is unable to carry on his business because of the expense and lack of help to comply with said regulations.

X.

As to paragraph XIII of said complaint, the defendant admits that it prepared a base period statement as required by Section 1499.11 (b) of said regulation, and filed said statement with the War Price and Rationing Board 5-1 Helena, Montana as required by Section 1499.13 (b), but denies each and every other allegation contained in said paragraph XIII.

XI.

Denies each and every allegation contained in paragraph XIV of said complaint.

XII.

Alleges that said complaint does not state facts sufficient to constitute or state a cause of action on which relief can be granted in that there is no showing that in the judgment of the Price Administrator it was necessary to establish maximum prices on the commodities set forth in said complaint as sold by defendant and that said Price Administrator complied with the provisions of said Emergency Price Control Act in establishing maximum prices on said commodities.

XIII.

Denies each and every allegation in said complaint not herein specifically admitted or denied.

Wherefore, the defendant having fully answered the complaint of the plaintiff on file herein, defendant prays that said action be dismissed, and [58] that defendant have such other and further relief

as to the court may seem equitable and just in the premises.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant,
Helena, Montana.

Service duly admitted, and copy of within and foregoing Answer received this 20th day of December, A. D., 1943.

CLARENCE E. WOHL

Attorneys for Plaintiff.

[Endorsed]: Filed December 20, 1943. [59]

Thereafter, on December 22, 1943, Plaintiff's motion to strike from Defendant's answer was filed herein, in the words and figures following, to-wit:

[60]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the plaintiff above named, and with respect to defendant's answer on file herein, moves the court as follows, to-wit:

I.

To strike each and all of the following allegations contained in Paragraph No. IX thereof:

“and alleges that the regulations set forth in said paragraphs do not conform to the Emergency Price Control Act of 1942 in that said regulations exceed the authority granted by

said Emergency Price Control Act of 1942 as said regulations provide that no person can sell any commodity at a price higher than a price charged by the seller for the commodity or similar commodity during March 1942 and Section 902 Tit. 50 U.S.C.A. provides that 'Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act;' alleges that the purposes of the act are defined in Section 901 Tit. 50 U.S.C.A. 'To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;' alleges that said act does not provide for the defining of cost of living commodities and the filing of statements and amendments thereto of prices and descriptions of all commodities; alleges that said regulations are contrary to the provisions of article I, paragraph I of the Constitution of the United States in that said regulations are a usurpation on the power of Congress as said regulations are illegal [61] legislation and the Constitution of the United States provides that Congress shall have the power to legislate; alleges that said regulations are contrary to the provisions of

Amendment 5 to the Constitution of the United States in that said regulations deprive defendant of liberty and property without due process of law as said defendant is unable to carry on his business because of the expense and lack of help to comply with said regulations.”

upon the following grounds and for the following reason separately stated, to-wit:

(a) That said allegations fail to state a defense to plaintiff's complaint.

(b) That said allegations are immaterial.

(c) That said allegations constitute redundant matter.

(d) That this Court is deprived by the Emergency Price Control Act of 1942, of jurisdiction to determine the validity of the General Maximum Price Regulation, and has no jurisdiction to determine its validity.

II.

To strike each and every allegation, matter and thing contained in paragraph XII thereof, upon the following grounds and for the following reasons separately stated, to-wit:

(a) That said allegations fail to state a defense to Plaintiff's complaint.

(b) That said allegations are immaterial.

(c) That said allegations constitute redundant matter.

(d) That this Court is deprived by the Emergency Price Control Act of 1942, of jurisdiction to determine the validity of the General Maximum

Price Regulation, and has no jurisdiction to determine its validity.

GEORGE S. SMITH
PHILIP SAVARESY
CLARENCE E. WOHL

Attorneys for Plaintiff
Room 321, Placer Hotel,
Helena, Montana [62]

Service of the foregoing Motion and receipt of true and correct copy thereof, admitted and acknowledged this 22 day of December 1943.

PAUL W. SMITH
Attorney for Defendant.

DAVID R. SMITH
Attorney for Defendant.

[Endorsed]: Filed December 22, 1943. [63]

Thereafter, on January 8, 1944, an Order denying motion to strike from answer was filed herein, in the words and figures following, to-wit: [72]

District Court of the United States
District of Montana,
Helena Division

No. 173

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

v.

SANDEN AND FERGUSEN COMPANY,
Defendant.

ORDER DENYING MOTION TO STRIKE
FROM ANSWER

It is Ordered, and this does order, that Plaintiff's Motion to Strike from Paragraph IX of the Answer of the Defendant on file herein be and the same is hereby denied in its entirety.

Done in open court at Helena, Montana, January 8, 1944.

JAMES H. BALDWIN

United States District Judge
District of Montana

[Endorsed]: Filed Jan. 8, 1944. [73]

Thereafter, on June 29, 1944, the Court's Findings of Fact, Conclusions of Law and Order was filed herein, in the words and figures following, to-wit: [100]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This cause came duly and regularly on for trial before the Court at Helena, Montana, the Honorable James H. Baldwin, Judge presiding, sitting without a jury. The Plaintiff was represented by its attorneys, Clarence E. Wohl and Philip Savarsey, and the Defendant was represented by its attorneys, Paul W. Smith and David R. Smith.

Oral testimony was heard and certain exhibits were identified and admitted in evidence and at the close of the testimony the parties Plaintiff and Defendant announced that they rested and by agreement of counsel, expressed in open court, the parties litigant were granted time after the completion of the transcript of the proceedings had at the trial herein within which to prepare, serve upon the opposing party, and lodge with the Clerk of the Court memoranda of authorities in support of their contentions and proposed findings of fact and conclusions of law.

The parties litigant filed their memoranda of authorities and proposed findings of fact and conclusions of law within the time allowed, and being fully advised in the premises, the Court finds the facts to be as follows:

FINDINGS OF FACT

1. In the judgment of Plaintiff, formerly Prentiss M. Brown, Administrator, Office of Price Administration, and at present Chester Bowles, Ad-

ministrator, Office of Price Administration, Defendant has engaged in actions and practices which constitute a [101] violation of Section 4 (a) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, 2d session, 56 Stat. 23; 50 United States Codes Annotated, Sections 901-946;) as amended (Public Law 729, 77th Congress, 2d session, c. 578, 56 Stat. 765), hereinafter called the "Act," in that it is charged with having violated the General Maximum Price Regulations issued pursuant to Sections 2 (a) and 202 (b) of the Act;

2. Plaintiff brings this proceeding for an order suspending the license of the Defendant pursuant to the provisions of Section 205 (f) (2) of the Act; and, in the alternative, pursuant to the provisions of Section 205 (a) of the Act to enforce compliance with said Section 4(a) of the Act and to permanently enjoin and restrain defendant, its agents, servants, employees, and all persons in active concert or participation with it, from selling, delivering, or offering for sale or delivery, any commodity in violation of the General Maximum Price Regulation, as heretofore or hereafter amended or revised, and doing, attempting, or agreeing to any thing in violation thereof, or in violation of any regulation adopted pursuant to said Sections 2 (a) and 202 (b) of the Act:

3. Jurisdiction of this proceeding is conferred upon this Court by Sections 205 (c) and 205 (f) 2 of the Act.

4. Defendant's gross sales, at all times material hereto, have exceeded the sum of \$100,000 per year;

5. At all times pertinent hereto the General Maximum Price Regulation (7 Federal Register 3153), which established maximum prices for commodities regulated thereby and provided that no person should sell or deliver any commodity at a price higher than the maximum price established by the regulation, has been in effect pursuant to Sections 2 (a) and 202 (b) of the Act;

6. By the provision of Section 16 of said General Maximum Price Regulation every person selling at wholesale or retail any commodity for which a maximum price is established by said regulation or by any other price regulation of the Office of Price [102] Administration making applicable the provisions of said Section 16 was granted a license as a condition to selling such commodity;

7. At all times material hereto Defendant has operated a store at 111 North Main Street, in the city of Helena, in the state and district of Montana, and has sold and is now selling at retail from said store yard goods, wearing apparel, sheets, pillow cases, towels, bias tape, overalls, diapers, mattresses, and other commodities for which maximum prices are and at all times material hereto were established by said General Maximum Price Regulation and other price regulations of the Office of Price Administration;

8. Defendant was granted a license as a condition to selling such commodities in said store at retail under and pursuant to the provisions of Section 16 of said General Maximum Price Regulation;

9. On or about January 14, 1943, a warning no-

tice was sent by the Office of Price Administration to the Defendant, by registered mail, pursuant to the provisions of Section 205 (f) (2) of the Act, and the same was received by the Defendant at Helena, Montana on or about January 16, 1943:

10. Said warning notice so sent and received as aforesaid is in words and figures as follows:

Office of Price Administration
Region VII
Denver, Colorado
Warning Notice

“To: Sanden & Ferguson Company
111 North Main Street
Helena, Montana

“By the provisions of Section 16 of the General Maximum Price Regulation you were granted a license as a condition of selling, at wholesale or retail, any commodity or commodities with respect to which such licensing provisions are applicable.

“In the judgment of the undersigned, Regional Administrator of Region VII of the Office of Price Administration:

“1. You failed to prepare on or before July 1, 1942 and keep for examination a statement showing the highest prices charged by you for those commodities for which maximum prices are established by the General Maximum Price Regulation and which you delivered during the month of March, 1942, and showing the prices at which you offered to deliver such commodities during that month, to-

gether with an appropriate description or identification of each such commodity, thereby violating Section 11 (b) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation. [103]

“2. You failed to file on or before July 1, 1942, with your War Price and Rationing Board a statement showing your maximum price for each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (b) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

“3. You failed on or about December 28, 1942, to have posted or marked in your premises in a manner plainly visible to and understandable by the purchasing public, the maximum price of each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (a) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

“Notice is further given, if, after receipt of this warning notice, you violate any provisions of your license, or any provisions of any regulations, incidental order, or requirement with respect to which your license is applicable, proceedings may be instituted in a court of competent jurisdiction for an order suspending your license to sell at wholesale or retail any commodities to which your license is applicable.

“This warning notice is sent to you pursuant to

the provisions of Section 205 (f) (2) of the Emergency Price Control Act of 1942 and under the authority conferred upon the Regional Administrator by General Order No. 27 (7 F.R. 5480, 8797, 9053, and 9908).

Jan. 14, 1943

/s/ CLEM W. COLLINS

Regional Administrator''

11. Among other things the General Maximum Price Regulation provides as follows:

Section 1499.1 Prohibition Against Dealing in
Commodities or Services Above Maximum
Prices:

On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this General Maximum Price Regulation;

* * *

Section 1499.2 Maximum Prices for Commodities
and Services: General Provisions:

Except as otherwise provided in this regulation, the seller's maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

- (1) For the same commodity or service; or
- (2) If no charge was made for the same

commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942 by the most closely competitive seller of the same class; [104]

(1) For the same commodity or service; or,

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

Highest Price Charged During March, 1942:

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller during March, 1942 shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March, 1942 to a purchaser of the same class; or

(b) If the seller made no such delivery or supplied no such service during March, 1942, his highest offering price for delivery or supply during that month to a purchaser of the same class; or,

(c) If the seller made no such delivery or supplied no such service and had no such offering price to a purchaser of the same class, the highest price charged by the seller during March, 1942 to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers: * * * * *

12. Among other things said General Maximum Price Regulation provides as follows:

Section 1499.11 Base-Period Records:

Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March, 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and,

(2) All his customary allowances, discounts, and other price differentials. * * * * *

13. Among other things said General Maximum Price Regulation provides as follows:

Section 1499.12 Current Records:

Every person selling commodities or services for which, [105] upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records show-

ing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

14. Among other things said General Maximum Price Regulation provides as follows:

Section 1499.13 Maximum Prices of Cost-of-Living Commodities: Statement, Marking or Posting.

For the purposes of this section, a cost-of-living commodity is any commodity designated as such by the Price Administrator. A list of the classes of commodities so designated appears in Section 1499.-25, Appendix B, of this General Maximum Price Regulation.

(a) On and after May 18, 1942, every person offering to sell a cost-of-living commodity at retail shall mark the maximum price of such commodity in a manner plainly visible to, and understandable by, the purchasing public. The maximum price may be marked on the commodity itself, or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale; Provided, That whichever of the above methods of posting is adopted, the maximum price of each commodity offered for sale shall be plainly visible to the purchaser at the place in the business establishment where the commodity is offered for sale, and shall not be obscured by the posted price of other commodities, whether by use of price books or catalogs or layers of price lists or otherwise or in any other

manner. The maximum price shall be stated as follows: "Ceiling Price \$...;" or "Our Ceiling \$..." Any person choosing to post by price-lines the maximum prices of commodities in the classifications marked by asterisks in Appendix B, shall post the maximum price by price-line at the place in the business establishment where the commodities in such price-line are offered for sale, and, in addition, shall mark the selling price of [106] each such commodity on the commodity itself. * * * * *

(b) On or before July 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the tenth day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity. * * * * *

15. On or about February 1, 1943, and subsequent to the receipt by it of the warning notice hereinbefore referred to the Defendant prepared a base period statement, on the basis of all available information and records, showing:

(1) The highest prices which it charged for such of those commodities as it delivered during March, 1942, and its offering price for de-

livery of such commodities during such month together with an appropriate description and identification of each of such commodities insofar as the Defendant was able to do so; and,

(2) All its customary allowances, discounts and other price differentials as required by Section 1499.11 of said General Maximum Price Regulation;

16. Continuously for more than fifty (50) years immediately prior to February 1, 1943, the Defendant had operated on a cost basis and not on a permanent inventory basis and therefore did not keep records of the names of manufacturers, lot numbers, descriptions of merchandise, or identification of merchandise as to lot numbers, manufacturers, textures, grades, and so forth;

17. In January, 1943, and prior to Defendant's making its said base period statement and its cost-of-living commodity statement, Eugene Sanden, then Assistant Manager of the Defendant company, went to the Office of Price Administration in the Placer Hotel at Helena, Montana and there interviewed Mr. Loren Anderson and Mr. Stephen T. McDermott, officials in the Office of Price Administration, and told these officials of the difficulties he was having in connection with operating the store and his help problem [107] and that he was unable to furnish some of the information called for by said General Maximum Price Regulation, and they then and there had the understanding that it would be all right for the Defendant to prepare said statements by taking

the merchandise that was in Defendant's store at 111 North Main Street, Helena, Montana at that time, and pursuant to that understanding the Defendant endeavored to list all the merchandise in said store, and did so to the best of its ability;

18. Due to the fact that the Defendant had operated on a cost basis for over fifty years and not on a permanent inventory cash basis as aforesaid, the Defendant did not have some of the information required by said General Maximum Price Regulation such as lot numbers, names of manufacturers, descriptions of merchandise, and identification of merchandise, which had previously been explained to said officials of the Office of Price Administration at the conference held at the Office of Price Administration in the Placer Hotel in Helena, Montana in January, 1943, as aforesaid, and for that reason, and that reason alone, such information was not set out in said base period statement and said cost-of-living commodity statement, or either of them:

19. In February, 1943, when said base period statement and said cost-of-living commodity statement were prepared the Defendant handled and had in its said store for sale approximately four thousand (4,000) different items of merchandise, there was not then as much merchandise in said store as there was in March, 1942; and, new merchandise had come into said store which had replaced a great deal of the merchandise which had been in said store in March, 1942;

20. The merchandise which had come into said store subsequent to March, 1942, and which had replaced a great deal of the merchandise which was in

said store in March, 1942, was of a different quality, grade, width, color, design, and kind;

21. Because of the fact that the Defendant operated on a cost basis and not on a permanent inventory basis the sales slips of merchandise sold by it, as indicated by exhibits introduced in evidence during the trial of this case were not marked with lot numbers, grades, widths, and so forth, and as a result it was and is [108] impossible to determine from said sales slips, or any of them, the quality, grade, width, color, design, or kind for the purpose of comparing sales prices shown on such sales slips and prices shown on said base period statement and cost-of-living commodity statement;

22. To require that the Defendant mark sales slips of merchandise sold by it in its said store with lot numbers, grades, widths, and so forth, or the quality, grade, width, color, design, or kind for the purpose of comparing sales prices shown on sales slips and prices shown on its base period statement and cost of living commodity statement would be in operation and effect to use the powers granted in Section 2 of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 24 (Section 902, Title 50, U.S.C.A.) to be used and made to operate to compel changes in its business practices, cost practices, and methods contrary to law. (See Section 2 (h), Emergency Price Control Act of 1942, 56 Stat., p. 27; Sec. 902, Title 50, U.S.C.A.)

23. If the Defendant were compelled by the Plaintiff to furnish in its base period statement and

cost-of-living commodity statement all of the information required by the said General Maximum Price Regulation, the Defendant would have to change its business practices, cost practices, and methods by installing a permanent inventory system which would cost at least \$2,000.00 and require the Defendant to employ two additional bookkeepers and compel the Defendant to close its said place of business because of the additional expense;

24. The base period statement and the cost-of-living commodity statement hereinbefore referred to were carefully made by the Defendant in an honest effort to meet the requirements of said General Maximum Price Regulation;

25. A few sales slips were introduced in evidence during the trial of this case which indicate that the Defendant sold in its said store in March, 1943, merchandise such as Black Bear heavy duck overalls which cost Defendant \$33.00 a dozen in Seattle for the regular sizes, and \$36.30 a dozen for the extra sizes, all [109] of which the Defendant sold below cost, had not been listed on said cost-of-living commodity statement, but in each case the failure to list said merchandise was an error or an oversight and entirely without any intent to violate any provision of said General Maximum Price Regulation;

26. At no time did the Defendant mark up any price on merchandise contained in its said store in March, 1942, and the original tickets showing the price at which such merchandise was offered for

sale and would be delivered in March, 1942, is and at all times has been plainly marked on the commodity itself;

Gingham.

27. Gingham was referred to in the cost-of-living commodity statement, "To February 1, 1943," filed by the Defendant in the Office of Price Administration at Helena, Montana, as aforesaid, in these words:

"Article	Style Number	Manuf.	Description	Maximum Price
Gingham	Golden Rod	Carson		.39"

(Plaintiff's Exhibit No. 1, page 4)

It appears from Plaintiff's Exhibit No. 5, introduced in evidence during the trial of this case, that in March, 1942, Defendant made six sales of gingham, a yard goods,—three at 35c per yard, and 3 at 29c per yard; but, it is not shown that these were the only sales of gingham made by the Defendant in that month;

It appears from Plaintiff's Exhibit No. 6, introduced in evidence during the trial of this case, that in February, 1943, Defendant made three sales of gingham, a yard goods, at 39c per yard;

It appears from Plaintiff's Exhibit No. 25, introduced in evidence during the trial of this case, that in February, 1943, the Defendant received a shipment of gingham from "Butler Brothers, * * * Minneapolis, Minnesota;"

It is not shown that the gingham referred to in said cost-of-living commodity statement and the gingham so sold and delivered by the Defendant in

March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (see Plaintiff's Exhibit No. 4 [110] pp. 8 and 9) and,

It is shown that there are fifteen or twenty different qualities of gingham (Tr. p. 72, l. 1), that none of the March, 1942, sales slips show the quality, width, or color of the gingham sold (Tr. p. 29, 11. 3-10); and, that the gingham sold by the Defendant in March, 1942, (Plaintiff's Exhibit No. 5) and February, 1943, (Plaintiff's Exhibit No. 6) were not of the same quality. (Tr. p. 63, 11. 4-8)

Denim

28. Denim was referred to in the cost-of-living commodity statement, "To February 1, 1943," filed by the Defendant in the Office of Price Administration at Helena, Montana, as aforesaid, in these words:

"Article	Style No.	Manuf.	Des.	Max. Price
Denim	5028	Schenck	colored	.45
"	overall	Butler	blue	.35

(Plaintiff's Exhibit No. 1, page 9)

It appears from Plaintiff's Exhibit No. 7, introduced in evidence during the trial of this case that in March, 1942, Defendant made two sales of denim, a yard goods, one at 29c per yard, and the other at 39c per yard; but, it is not shown that these were

the only sales of denim made by the Defendant in that month;

It appears from Plaintiff's Exhibit No. 8, introduced in evidence during the trial of this case, that in February, 1943, Defendant made six sales of denim, a yard goods, one at 45c per yard, four at 35c per yard, and one at 29c per yard;

It is shown that there are ten or fifteen ranges in this class of goods, each differing in quality and use from all the others; (Tr. p. 68, l. 26, to p. 69, l. 11), that at the time said cost-of-living commodity statement (Plaintiff's Exhibit No. 1) was prepared the Defendant listed every kind of denim that it then had on its shelves, and that between March, 1942, and February, 1943, the Defendant may have received some of the other types of denim and put them on the shelves in its said store; (Tr. p. 69, l. 15 to 24)

It is not shown that the denim referred to in said cost-of-living commodity statement and the denim so sold and delivered by the Defendant [111] in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (see Plaintiff's Exhibit No. 4, pp. 8 and 9 and,

None of the March, 1942, sales slips (Plaintiff's Exhibit No. 7) or the February, 1943, sales slips (Plaintiff's Exhibit No. 8) show in which of said ten or fifteen ranges the merchandise sold falls.

Challis

29. Challis was referred to in the cost-of-living commodity statement, "To February 1, 1943," filed by the Defendant in the Office of Price Administration at Helena, Montana, as aforesaid, in these words:

Article	Style-Lot	Manuf.	Des.	Max. Price
Chali	5904	C.P.S.	Figured	.32"

(Plaintiff's Exhibit No. 1, page 9)

It appears from Plaintiff's Exhibit No. 9, introduced in evidence during the trial of this case, that in March, 1942 the Defendant made one sale of challis at 25c per yard;

No sale of challis is shown to have been made by the Defendant at any other time.

Spun Rayon

30. In the cost-of-living commodity statement filed by the Defendant in the Office of Price Administration at Helena, Montana, as aforesaid, under the heading "rayon goods," the Defendant listed twenty-three different items in words and figures as follows:

Article	Style No.	Manuf.	Des.	Max. Price
Rayon Goods		W.B.Co.	colored	.59
"		CPS	Printed	.89
"		Belding	"	.89
"		Butlers	"	.59
"	Sheer	Belding	"	1.00
"		"	"	1.00
"		Butlers	Plain	.59
"		Belding	"	.89
"	Sheer	"	"	.89

"Article	Style No.	Manuf.	Des.	Max. Price
Rayon Goods		Belding	Plain	1.00
"	"	"	"	1.19
"	"	"	"	1.29
"		Schenck	Satin	.59
"		"	"	.89
"		"	Taffatte	.79
"		Butler	Sharkskin	.89
"		"	Doeskin	.89
"		Belding	Satin Plain	1.25
"		"	Plaid	.98
"	T65	Schenck	Plain	1.65
"	875	Belding	"	1.00
"	Gaberdine	"	"	.89
"	"	"	"	1.19"

(Plaintiff's Exhibit No. 1, page 3) [112]

It appears from Plaintiff's Exhibit No. 10, introduced in evidence during the trial of this case, that in March, 1942, the Defendant made two sales of "spun Rayon," a yard goods,—one at 79c per yard, and the other at 59c per yard;

It is not shown that the rayon so sold as evidenced by Plaintiff's Exhibit No. 10 does not fall within the rayon goods described in said cost-of-living commodity statement;

It appears from Plaintiff's Exhibit No. 25, introduced in evidence during the trial of this case, that on February 2, 1943, Butler Brothers of Minneapolis, Minnesota shipped to the Defendant at Helena, Montana sixty-three yards of "spun rayon;"

It appears from Plaintiff's Exhibit No. 11, introduced in evidence during the trial of this case, that in February, 1943, defendant made two sales of "spun rayon," a yard goods, at 89c per yard.

It is not shown that the rayon goods mentioned in said cost-of-living commodity statement and the "spun rayon" so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line. See Plaintiff's Exhibit No. 4, pp. 8 and 9)

Indian Head

31. Indian head was referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration, Helena, Montana, as aforesaid, in these words:

"Article	Style No.	Manuf.	Des.	Max. Price
Indian H.		Butlers	white-44	.49
"		"	" -54	.59"

(Plaintiff's Exhibit No. 1, page 4)

It appears from Plaintiff's Exhibit No. 17, introduced in evidence during the trial of this case, that in March, 1942, Defendant made six sales of Indian head, a yard goods,—one at 40c per yard, one at 42c per yard, and four at 35c per yard.

The only description of the merchandise so sold as evidenced by each of the sales slips included within said Exhibit No. 17 is as follows: "I. head."

It appears from Plaintiff's Exhibit No. 18, introduced in evidence [113] during the trial of this case, that in February, 1943, Defendant made six sales of Indian head,—three at 50c per yard, one at 46c per yard, and two at 59c per yard;

The only description of the merchandise so sold as evidenced by each of the sales slips included within said Exhibit No. 18 is as follows: "I. head."

It is shown that there are six different widths, colors, and qualities of indian head and that the widths, colors, and qualities govern the price of the merchandise. (Tr. p. 73)

It is not shown that the indian head referred to in said cost-of-living commodity statement and the indian head so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (see Plaintiff's Exhibit No. 4, pp. 8 and 9) or what the width, color, or quality of any of them was.

Burlap

32. As stated by Plaintiff, "While burlap is not a cost-of-living commodity, and need not have been listed in the cost-of-living commodity statement, Defendant did assume to list it." (Plaintiff's brief herein, p. 39, lines 2 and 3)

The fact is that burlap is not listed in said cost-of-living commodity statement, filed by the Defendant with the Office of Price Administration, Helena, Montana, as aforesaid. (Plaintiff's Exhibit No. 1, and testimony of Donald L. Creel, Plaintiff's witness, Tr. p. 46, lines 21-23)

It appears from Plaintiff's Exhibit No. 22, introduced in evidence during the trial of this case, that

in March, 1942, Defendant made two sales of burlap, a yard goods, at 29c per yard.

Eyelette

33. Eyelette was referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration, Helena, Montana, as aforesaid, in these words:

“Article	Style No.	Manuf.	Des.	Max. Price
Eyelette		Robinsons	white	\$1”

(Plaintiff’s Exhibit No. 1, p. 3)

It appears from Plaintiff’s Exhibit No. 12, introduced in evidence [114] during the trial of this case, that as of date ‘3-18” there was sold “1/3 Eyelet 27.”

No other sale of eyelette is shown.

Ticking

34. Ticking, a yard goods, was referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration, Helena, Montana, as aforesaid, in these words:

“Article	Style No.	Manuf.	Des.	Max. Price
Ticking	4388	Mitchell F	colored	.65
“	amoskeig	Butlers	plain	.35
“	4504	CPS	plain	.69
“	short length	CPS	figured	.65”

(Plaintiff’s Exhibit No. 1, page 9)

It appears from Plaintiff’s Exhibit No. 21, introduced inevidence during the trial of this case, that in March, 1942, Defendant made six sales of ticking, a yard goods,—four at 50c per yard, one at 35c per yard, and one at 25c per yard.

It is not shown that any other sales of ticking were made by the Defendant.

Percale

35. Percale, a yard goods, was referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration, Helena, Montana, as aforesaid, in these words:

“Article	Style No.	Manuf.	Des.	Max. Price
Plain per.	Golden Star	Rice-Stix	80 sq.	.35 yd.”

(Plaintiff’s Exhibit No. 1, page 4)

It appears from Plaintiff’s Exhibit No. 19, introduced in evidence during the trial of this case, that in March, 1942, Defendant made twenty sales of percale, a yard goods,—nineteen at 29c per yard,

It appears from Plaintiff’s Exhibit No. 20, introduced in evidence during the trial of this case, that Defendant made ten sales of percale—two under

dates of “2-15” and “2-13” at 35c per yard, seven in February, 1943, of which five were at 35c per yard, and two were at 33c per yard, and one in February, 1944, at 35c per yard.

It is shown that percale is of different qualities, weights, and widths, and falls in different price ranges (Tr. p. 74, lines 4-7), and that the only way in which one can identify the quality and class of goods sold as evidenced by the sales slips included in Exhibit No. 20 is by the price for which the merchandise sold. (Tr. p. 73 lines 28-31) [115]

Gaberdine

36. Gaberdine was referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration at Helena, Montana as aforesaid, in these words:

Article	Style No.	Manuf.	Des.	Max. Price
Rayon	Gaberdine	Belding	Plain	.89
..	"	"	"	1.19"

(Plaintiff's Exhibit No. 1, p. 3, lines 45 and 46)

It appears from Plaintiff's Exhibit No. 13, introduced in evidence during the trial of this case, that in March, 1942, Defendant made four sales of gaberdine, a yard goods,—three at 39c per yard, and one at 85c per yard.

It is not shown that these were the only sales of gaberdine made by the Defendant in that month.

It appears that in February, 1943, the Defendant received from Butler Brothers, Minneapolis, Minnesota, a shipment of gaberdine. (Plaintiff's Exhibit No. 25)

It appears from Plaintiff's Exhibit No. 14 that in February, 1943, the Defendant made ten sales of gaberdine,—one at 85c per yard, seven at \$1 per yard, and two at 89c per yard.

It is not shown that the gaberdine referred to in the cost-of-living commodity statement, so filed as aforesaid, and the gaberdine so sold and delivered as aforesaid in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which

would ordinarily sell in the same price line; (see Plaintiff's Exhibit No. 4, pp. 8 and 9) and,

It is shown that the sales slips included in Plaintiff's Exhibit No. 14 evidence sales of different qualities of gaberdine and that the sales slips introduced in evidence during the trial of this case as Plaintiff's Exhibit No. 13 evidence sales of different kinds of gaberdine. (Tr. p. 63, lines 9 to 20)

Jersey

37. It appears from Plaintiff's Exhibit No. 15, introduced in evidence during the trial of this case, that in March, 1942, Defendant made four sales of jersey, a yard goods,—two at \$1.65 per yard, and one at 95c per yard, and one at \$1.19 per yard.

It appears from Plaintiff's Exhibit No. 16, introduced in evidence [116] during the trial of this case, that in February, 1943, Defendant made ten sales of jersey at \$1.69 per yard.

It is not shown that the jersey referred to in the cost-of-living commodity statement, so filed as aforesaid, and the jersey so sold and delivered as aforesaid in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give a purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (See Plaintiff's Exhibit No. 4, pp. 8 and 9)

It is shown that jersey, a yard goods, is a knitted fabric which varies in width, colors, and weight, has different ranges as to price and quality, and that the only way in which one looking at the sales slips

put in evidence during the trial of this case as Plaintiff's Exhibits Nos. 15 and 16 can determine the quality and kind of the jersey sold is by the price. (Tr. pp. 72 and 73)

Overalls

38. Overalls were referred to in the cost-of-living commodity statement, filed by the Defendant in the Office of Price Administration at Helena, Montana as aforesaid, in these words:

"Article	Style Lot	Manuf.	Des.	Mx. Price
Overalls		Crown Special	Extra Heavy	1.50
"		Long Wear	"	1.50
"		Headlight	"	1.50
"		Headlight	Bib Large	2.00
"		Headlight	Bib "	2.50
"		Ruff Rider	Waist	1.50
"		Calf Skin	Bib	1.50
"		Red Kab	Bib	1.50"

(Plaintiff's Exhibit No. 1, p. 15)

It appears from Plaintiff's Exhibit No. 23, introduced in evidence during the trial of this case, that in February, 1943, Defendant made four sales of overalls at \$3 each.

It is not shown that the overalls referred to in said cost-of-living commodity statement and the overalls so sold and delivered by the Defendant in February, 1943, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line. (See Plaintiff's Exhibit No. 4, pp. 8 and 9)

It is shown that at the time said cost-of-living

commodity statement was prepared and filed as aforesaid the overalls sold and delivered in [117] March, 1943, as evidenced by Plaintiff's Exhibit No. 23, were on hand under a shelf in Defendant's said store at 111 North Main Street, Helena, Montana, and that they were overlooked "in the rush" of preparing said cost-of-living commodity statement, so filed by the Defendant in the Office of Price Administration at Helena, Montana as aforesaid; (Tr. p. 84, lines 11 to 13) and that the overalls sold by the Defendant in March, 1943, as evidenced by Plaintiff's Exhibit No. 23, cost the Defendant \$33 a dozen in Seattle for the regular sizes, and \$36.30 a dozen in Seattle for the extra sizes; (Tr. p. 84, lines 25 to 31) and,

It is not shown whether or not the overalls sold by the Defendant at Helena, Montana in February, 1943, as evidenced by Plaintiff's Exhibit No. 23, were regular sizes or extra sizes.

Sateen

39. Sateen, a yard goods, was referred to in the cost-of-living commodity, statement, filed by the Defendant in the Office of Price Administration at Helena, Montana as aforesaid, in these words:

Article	Style No.	Manuf.	Des.	Max. Price
Sateen		Robinsons	colors	.45"

(Plaintiff's Exhibit No. 1, page 4)

It appears from Plaintiff's Exhibit No. 24, introduced in evidence during the trial of this case, that under date of "2-16" the Defendant sold and delivered "5 yd. sateen 2.95."

It is not shown in what year the sateen referred to in Plaintiff's Exhibit No. 24, introduced in evidence as aforesaid, was sold, or that the sateen referred to in said cost-of-living commodity statement and the sateen sold and delivered by the Defendant as evidenced by Plaintiff's Exhibit No. 24 referred to the same or a similar article or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line. (See Plaintiff's Exhibit No. 4, pp. 8 and 9) and,

It is shown that sateen, a yard goods, differs in price range, quality, weight, widths, and so forth, (Tr. p. 74, lines 4-7) and that the only way in which one can identify the quality and class of sateen by an inspection of sales slips is by the price charged. (Tr. p. 73, lines 28-30) [118]

40. The Defendant, Sanden and Ferguson Company, a Montana corporation, at all times displayed its ceiling prices for all cost-of-living commodities carried in its store at 111 North Main Street, Helena, Montana, on or near the merchandise and easily visible to customers. (See pp. 22 and 23, Plaintiff's Exhibit No. 4)

41. The Defendant, Sanden and Ferguson Company, a Montana corporation, has at all times endeavored in good faith to comply with and abide by the provisions of the Emergency Price Control Act of 1942, and with each and all of the rules and regulations issued thereunder, including said General Maximum Price Regulation (7 Fed. Reg. 3153) and all acts and regulations supplemental thereto

and amendatory thereof, and intends to and will continue to do so at all times in the future;

42. It is not shown that the Defendant, Sanden and Ferguson Company, a Montana corporation, ever at any time or at all engaged, or that it is about to engage, in any act or practice contrary to the provisions of the Emergency Price Control Act of 1942, or any rule or regulation issued thereunder, including said General Maximum Price Regulation (7 Fed. Reg. 3153), or any regulation supplemental thereto or amendatory thereof; and,

43. Except as hereinbefore specifically found, the Court finds generally each and all of the facts in issue herein in favor of the Defendant, Sanden and Ferguson Company, a Montana corporation, and against the Plaintiff, Chester Bowles, Administrator, Office of Price Administration.

CONCLUSIONS OF LAW

From the foregoing facts the Court draws the following conclusions of law:

1. This Court has jurisdiction of the subject matter of this action in equity and of the parties Plaintiff and Defendant herein;

2. The Plaintiff, Chester Bowles, Administrator, Office of Price Administration, is without right in the premises; and

3. That the preliminary and final injunction and all other relief requested by the Plaintiff herein should be denied and the action dismissed in its entirety with prejudice. [119]

Proper form of judgment will be presented for signature and filing.

Done in open court at Butte, Montana, June 29, 1944.

JAMES H. BALDWIN

United States District Judge
District of Montana

[Endorsed] Filed June 29, 1944. [120]

Thereafter, on July 6, 1944, a Judgment signed by the Court and filed on July 5, 1944, was duly entered herein, in the words and figures following, to-wit: [121]

District Court of the United States, District of Montana, Helena Division.

No. 173

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff

v.

SANDEN and FFERGUSON COMPANY,
a Montana Corporation,

Defendant.

JUDGMENT

This cause came duly and regularly on for trial before the Court at Helena, Montana, the Honorable James H. Baldwin, Judge presiding, sitting

without a jury. The Plaintiff was represented by its attorneys, Clarence E. Wohl and Philip Savarsey, and the Defendant was represented by its attorneys, Paul W. Smith and David R. Smith.

Oral testimony was heard and certain exhibits were identified and admitted in evidence and at the close of the testimony the parties Plaintiff and Defendant announced that they rested and by agreement of counsel, expressed in open court, the parties litigant were granted time after the completion of the transcript of the proceedings had at the trial herein within which to prepare, serve upon the opposing party, and lodge with the Clerk of the Court memoranda of authorities in support of their contentions and proposed findings of fact and conclusions of law.

The parties litigant filed their memoranda of authorities and proposed findings of fact and conclusions of law within the time allowed, and the court being fully advised in the premises, and having filed herein its Findings of Fact and [122] Conclusions of Law, and having directed that judgment be entered in accordance therewith, Now, Therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. This Court has jurisdiction of the subject matter of this action in equity and of the parties Plaintiff and Defendant herein;

2. That Plaintiff, Chester Bowles, Administrator, Office of Price Administration, is without right in the premises; and

3. That the preliminary and final injunction and all other relief requested by the Plaintiff herein is denied and the said action dismissed in its entirety with prejudice.

Done in open court at Butte, Montana, July Fifth, 1944.

JAMES H. BALDWIN

United States District Judge,
District of Montana.

[Endorsed]: Filed July 5, 1944. Entered July 6, 1944. [123]

Thereafter, on September 11, 1944, Notice of Appeal by Plaintiff was filed herein, in the words and figures following, to-wit: [124]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff herein, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the final judgment filed herein on July 5, 1944, and entered herein on July 6, 1944.

FLEMING JAMES, JR.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff

[Endorsed]: Filed Sept. 11, 1944. [125]

Thereafter, on September 11, 1944, docket entry showing mailing of copy Notice of Appeal to counsel for Defendant was made by the Clerk, in the words and figures following, to-wit:

Sept. 11, 1944, Mailed copy Notice of Appeal to Paul W. Smith and David R. Smith, Attys. for Deft. Helena, Montana. [126]

Thereafter, on September 11, 1944, Designation of Record was filed herein by the Plaintiff, in words and figures following, to-wit: [127]

[Title of District Court and Cause]

DESIGNATION OF RECORD ON APPEAL

The Clerk will please prepare a record in this action for the purposes of an appeal to the Circuit Court of Appeals of the 9th Circuit containing the following records, proceedings and evidence:

(1) plaintiff's complaint, (2) defendant's answer, (3) plaintiff's motion to strike portions of defendant's answer, (4) order denying plaintiff's motion to strike portions of defendant's answer, (5) plaintiff's interrogatories under rule 33 of the Federal Rules of Civil Procedure, (6) defendant's objections to plaintiff's interrogatories under rule 33 of the Federal Rules of Civil Procedure, (7) order on defendant's objections to plaintiff's interrogatories under rule 33 of the Federal Rules of Civil Procedure, (8) plaintiff's notice to defendant

to produce records on trial of action, (9) plaintiff's motion to substitute Chester Bowles, Administrator, as party plaintiff, (10) stipulation of parties to substitute party plaintiff, (11) minute entry of November 9, 1943, ordering substitution of party plaintiff, (12) plaintiff's request for findings of fact and conclusions of law, (13) defendant's request for findings of fact and conclusions of law, (14) court's findings of fact and conclusions of law (15) judgment of the court, (16) transcript of the evidence taken upon the trial of said action and which was stenographically reported, (17) plaintiff's original exhibits, numbered 1 to 27, inclu- [128] sive, and which were introduced in evidence upon the trial of said action.

Two copies of the transcript of the evidence taken upon the trial of said action are herewith filed with the Clerk of the above entitled court.

FLEMING JAMES, JR.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff

Received a copy of the foregoing this 11th day of September, 1944.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant-
Appellee

[Endorsed]: Filed Sept. 11, 1944. [129]

Thereafter, on September 11, 1944, Statement of Points on which Appellant intends to rely on appeal was filed herein, in the words and figures following, to-wit: [130]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The following is a concise statement of the points on which Chester Bowles, Administrator, Office of Price Administration, the Plaintiff and appellant herein, intends to rely on his appeal from the judgment in the above entitled court to the United States Circuit Court of Appeals, for the Ninth Circuit:

1. That the Court erred in entering a final judgment of dismissal herein.
2. That the court erred in entering a final judgment denying to plaintiff any of the relief prayed for in his complaint and dismissing plaintiff's action.
3. That the Court erred in failing to enter judgment in favor of plaintiff against defendant.

JAMES FLEMING, JR.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff.

Service of foregoing and receipt of true and correct copy thereof acknowledged and admitted this 11th day of September, 1944.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant

[Endorsed]: Filed Sept. 11, 1944. [131]

Thereafter, on September 11, 1944, Transcript of Evidence was filed herein by the Plaintiff, in the words and figures followin, to-wit: [132]

[Title of District Court and Cause.]

PROCEEDINGS

Be It Remembered that the above-entitled action came duly and regularly on for trial before the above-entitled Court, the Honorable James H. Baldwin, Judge presiding, sitting without a jury, at Helena, Montana on Friday, January 14, 1944, and the evidence not being concluded on that day, it was continued until ten o'clock in the morning on Saturday, January 15, 1944, on which day the evidence was completed. The Plaintiff, Chester Bowles, Administrator, Office of Price Administration, was represented by Clarence E. Wohl and Philip Savaresy, and the Defendant, Sanden and Ferguson Company, a Montana corporation, was represented by Paul W. Smith and David R. Smith. Thereupon the following proceedings were had and

taken and the following evidence, and none other, was introduced.

The Court: No. 173, Chester Bowles, Administrator, Office of Price Administration, v. Sanden and Ferguson Company, a Montana corporation. Are the parties ready?

Mr. Wohl: The Plaintiff is ready.

Mr. Paul Smith: The Defendant is ready.

The Court: Very well. I wish you would make a short statement [134] of the issues, the legal questions presented, and what you have to offer in support of it.

(Mr. Wohl made a statement as to the Plaintiff's contentions, and Mr. Paul Smith made a statement as to the Defendant's contentions.)

The Court: Call the first witness on behalf of the Plaintiff.

ROSE WILLMAN,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wohl:

Q. Your name is Rose Willman?

Mr. Paul Smith: May it please the Court, we object to the introduction of any evidence in this case on the ground that the Complaint does not state facts sufficient to constitute a cause of action on which relief can be granted.

The Court: Objection overruled.

A. Yes, sir.

Q. By whom are you employed?

A. By the War Price and Ration Board.

Q. Where? A. Helena, Montana.

(Testimony of Rose Willman.)

Q. And is that Board designated Board 5-1?

A. Yes.

Q. How long have you been employed there?

A. Since September 22, 1943.

Q. In what capacity are you employed?

A. Price Clerk.

Q. Would you state who has custody or charge of the cost of living statements filed with your office?

A. I have.

Q. Over what area does that Board serve? [135]

A. Lewis and Clark County.

Q. Is there any other War Price and Ration Board in Lewis and Clark County?

A. No.

Q. Mrs. Willman, can you state whether or not there is on file in your office a cost of living commodity statement filed by Sanden and Ferguson Company?

Mr. Paul Smith: We object to the question as incompetent, irrelevant, and immaterial; it has no bearing on the issues involved in this case, and that the proper foundation has not been laid for the introduction of this evidence.

The Court: Well, specifically what is the contention that the proper foundation has not been laid based on? The other questions raised may or may not be sound.

Mr. Smith: The specific objection is that the Price Administrator was not authorized by the Emergency Price Control Act to require statements as to all the commodities which the Defendant sold in its store.

(Testimony of Rose Willman.)

The Court: Very well. The objection will be overruled.

(Question read by the reporter.)

A. Yes.

Q. I hand you an instrument marked for identification as Plaintiff's Exhibit No. 1 and ask you what that is.

A. This is a copy of the cost of living commodity statement of Sanden and Ferguson.

Q. Did you compare that copy with the original on file in your office? A. Yes, I did.

Q. Is it a true and correct copy of it?

A. Yes, it is. [136]

Q. I direct your attention to the last page of Plaintiff's proposed Exhibit No. 1, and to the signature appearing thereon, Rose H. Willman, and I ask you if that is your signature?

A. Yes, it is.

Mr. Wohl: At this time we would like to offer in evidence an identified copy of the Defendant's cost of living commodity statement.

Mr. Paul Smith: We would like to object to the introduction of this exhibit in evidence on the ground that it is incompetent, irrelevant, and immaterial; that it has no bearing upon the issues in this case; that the proper foundation has not been laid for its introduction in evidence; on the grounds that this is based upon a regulation that is unconstitutional; that the Price Administrator did not have the authority to issue such a regulation or to re-

(Testimony of Rose Willman.)

quire such a statement to be filed, and that there is no provision in the Emergency Price Control Act requiring a statement of all the commodities which the Defendant sold.

The Court: I don't think the Government contends there is, but only with reference to cost of living commodities.

Mr. Smith: As to all cost of living commodities, and there is no provision of the Emergency Price Control Act which requires such a statement to be filed.

The Court: Well, it appears to me that it is highly likely we are encumbering the record, but that point is not raised; we will pass it. In other words, only certain commodities are involved in this case; possibly a complete statement of all commodities reported by them is not necessary. I suppose this document falls within the rules of allowing the production and putting in evidence of certified copies? [137]

Mr. Wohl: I assume it does; it was testified to as a compared copy.

The Court: The better practice, I think, would be to offer the original and then substitute a copy. The objection will be overruled.

(Plaintiff's Exhibit No. 1 admitted in evidence over Defendant's objection, is a cost of living commodities statement, and pursuant to agreement between counsel to be found later in this transcript, none of the exhibits will be included in this transcript.)

(Testimony of Rose Willman.)

Q. Mrs. Willman, have you made a search of the records of your office to determine whether or not Sanden and Ferguson Company has ever filed any supplement to this cost of living commodity statement?

Mr. Smith: Objected to on the same ground as we objected before the statement was admitted.

The Court: The objection will be overruled. These rulings are all pro forma.

A. Yes, I have.

Q. When did you make such an examination?

A. Yesterday.

Q. Were you able to find whether they did file any supplements to the cost of living statement?

A. I found nothing.

Mr. Wohl: You may cross-examine.

Mr. Smith: No cross-examination.

EUGENE SANDEN,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wohl:

Q. State your name, please. [138]

A. Eugene Sanden.

Q. Are you the manager of the Sanden and Ferguson Company in Helena, Montana?

A. My father is the manager; I assist him.

(Testimony of Eugene Sanden.)

Q. You are the assistant manager?

A. Yes.

Q. Your father has taken an active part in managing the store? A. Yes.

Q. How long have you been such assistant manager?

A. I presume for about fifteen or twenty years.

Q. Do you know when the Sanden and Ferguson Company was incorporated?

A. It was incorporated in 1910.

Q. Under the laws of what state?

A. Montana.

Q. How long has Sanden and Ferguson Company been engaged in business in Helena?

Mr. Paul Smith: Objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. My father began to engage in business in Helena shortly after 1885; he took part ownership in the early 1890's.

Q. Pardon me, but I don't believe your answer was responsive. How long has the corporation been engaged in business in Helena?

A. Since it was incorporated.

Q. Continuously since then?

A. Continuously since then, yes, sir.

Q. Mr. Sanden, did you participate in the preparation of the cost of living commodity statement for your store? A. Very slightly. [139]

Q. Would you tell us who did prepare the statement?

A. Well, I had been so short of help, and——

(Testimony of Eugene Sanden.)

The Court: Who did it?

A. Well, my sister did it.

Q. Who is your sister?

A. Mrs. F. H. MacPherson.

Q. Is she employed in your store?

A. No; she was employed temporarily. She came, if I may explain—she is the wife of a mining engineer. He was operating gold property in Northwest British Columbia, and when the gold mines were closed by Government order there as well as here, he came down through here on his way to take a position in Little Rock, Arkansas, and while Florence, my sister, was here, she undertook to gather this information through the store and through the help at the store and to typewrite it and get it over to your office. I had been unable to do it because I was simply swamped with work, as I am at the present time, but she prepared it.

Q. Did anyone else participate in preparing it?

A. Everyone in the store participated. That is, say the lady in the hosiery section, both of them, probably gathered what information they could, and the ladies in the notion section gathered what information they could and gave it to her, and she typewrote it down and so on through the various sections.

Q. Handing you an instrument marked Plaintiff's Exhibit No. 1, which purports to be a copy of the cost of living commodity statement of Sanden and Ferguson Company, I will ask you if you can

(Testimony of Eugene Sanden.)

identify that as being a copy of the statement prepared for you?

A. I would identify it as such, yes. [140]

Q. Do you know when that statement was filed with the War Price and Ration Board?

Mr. Paul Smith: Objected to as incompetent, irrelevant, and immaterial. He is not qualified to answer that.

The Court: Overruled.

A. Yes, I will answer that. That was in February, 1943.

Q. Mr. Sanden, we served notice on you to produce your base period statement. Do you have that with you?

A. Yes, that is in that envelope over there. That includes the cost of living commodity items. That is the statement that your investigators have used right along. I presume it is all there.

Q. Mr. Sanden, at the time that this cost of living commodity statement was prepared, a base period statement was likewise prepared, is that correct?

A. Yes, prepared at the same time; yes, sir.

Mr. Wohl: I would like to have these loose sheets identified as an exhibit.

The Court: Are they separate sheets?

Mr. Wohl: They are not bound together at all.

The Court: Well, the Court will stand in recess for a few minutes to give you an opportunity to fasten them together.

(Testimony of Eugene Sanden.)

(At this point the Court stood in recess for twenty minutes, after which the following proceedings were had:)

Q. Mr. Sanden, I hand you an instrument marked for identification as Plaintiff's Exhibit No. 2 and ask you if that is the base period statement prepared by Sanden and Ferguson Company?

A. This is a combination of the base period statement and the cost of living commodities statement you have already filed. We have a cost of living commodities such as you have filed already.

[141]

Q. What do you mean by that? Does this cost of living commodities incorporated in this base period statement represent March, 1942, prices?

A. Yes, that represents them.

Q. In other words this base period statement includes cost of living commodities and such other commodities that were not cost of living commodities?

A. We tried to include practically everything in the store; we tried, that is I gave instructions to that effect that all merchandise in the store should be listed.

Q. And this instrument marked Plaintiff's Exhibit No. 2 refers to March, 1942, prices of these commodities?

A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Paul Smith: Objected to on the same

(Testimony of Eugene Sanden.)

ground we objected to the other statement. We also object on the ground there is no provision of the law that establishes prices as of March, 1942. It is arbitrary legislation to establish prices in 1942 because there is no provisions in the law as of March, 1942. We also object on the ground that it is contrary to the Constitution in that the regulation is unconstitutional.

The Court: Well, the objection will be overruled. As I say, this ruling is pro forma now; it will be subject to briefing and consideration later.

Q. Mr. Sanden, who prepared this base period statement, if you know?

A. Mrs. F. H. MacPherson.

Q. With the assistance of any one else?

A. With the assistance of everyone in the store.

[142]

Q. Has Mrs. MacPherson had any mercantile experience?

A. Yes.

Q. Was she an employee of Sanden and Ferguson at any time?

A. She has worked for the store at times years ago.

Q. Do you know how the March prices were determined?—

Mr. Paul Smith: Objected to on the ground there is no provision in the Emergency Price Control Act establishing prices in March, 1942; it is incompetent, irrelevant, and immaterial.

Mr. Wohl: —May I finish my question?

The Court: Finish your question, then the objection will be considered as made.

(Testimony of Eugene Sanden.)

Q. ———that appear in the base period statement?

A. We went to the merchandise to gather the prices; just simply took the prices from the merchandise itself that was on hand at that time.

The Court: On hand at what time?

A. It was on hand at the time that this statement was prepared.

The Court: When was that?

A. In January and February, 1943.

Q. Were the same prices in effect in March, 1942, as in January and February, 1943?

Mr. Paul Smith: Objected to; there is no provision in the Emergency Price Control Act requiring the prices as of March, 1942; it is incompetent, irrelevant, and immaterial. We want this objection to go to all of these questions as to merchandise of March, 1942, and prices of commodities.

The Court: I take it the record may so show. My understanding is that the Administrator was left some discretion in these matters and he fixed this period in March, 1942. Well, it is [143] a matter for argument and later consideration; we can't consider these constitutional questions during the trial of the case. They will all be considered carefully and determined after being briefed by the parties here when the time comes, but now we will overrule the objection pro forma.

(Question read by the reporter.)

A. Yes.

(Testimony of Eugene Sanden.)

Q. That is for all commodities that appear in the base period statement? A. Yes.

Q. Did you handle the same makes, kinds, and qualities of commodities at the time you made the base period statement as in March, 1942?

A. We handled all of them, and we also perhaps handled a few others. There may have been a few additional ones handled in 1943 in addition to those handled in 1942.

Q. How many years of merchandising experience have you had, Mr. Sanden?

A. I began to work for my father when I was a small boy. But then, of course, there have been intermissions; there have been times when I have been away in school, times when I was in the army in the last war.

Q. Approximately how many years?

A. Well, let's see—probably thirty years.

Q. Who does the buying of commodities for Sanden and Ferguson Company?

A. We all work together on that in the ladies' ready-to-wear section. In the millinery Mrs. LeJeune does the buying; in the hosiery, Mrs. Southerland; same lady does the buying for [144] the ladies' foundation garments, ladies' underwear. In the men's section I do the buying generally. In the dry goods section Mrs. Clark does the buying for the most part, although we work together on that.

Q. Mr. Sanden, state whether it is not a fact

(Testimony of Eugene Sanden.)

that different qualities of merchandise have different lot numbers or different style numbers?

A. That is true.

Q. Is that the general rule?

A. Well, all merchandise is billed to us by different lot numbers.

Q. Would two different qualities of a particular commodity have the same lot number?

A. Would two different qualities of the same commodity?

Q. Yes, have the same lot number.

A. Well, if they are different qualities they would have different lot numbers.

Mr. Wohl: If the Court please, we would ask permission to substitute a copy of Exhibit No. 2 so that the original may be taken back by Mr. Sanden.

The Court: Any objection to that?

Mr. Smith: No, Your Honor.

The Court: Let the record show you may. Submit the copy to the Clerk for marking.

Mr. Wohl: May Exhibits No. 1 and No. 2 be considered as read into the record?

The Court: Well, Exhibit No. 1 appears to be a certified copy of a record in the hands of the OPA here. Exhibit No. 2 appears on the testimony of this witness to be a base period [145] statement and cost of living commodity prepared by the Defendant and produced by the witness on the stand as I gather it. Now as to Exhibit No. 2, submit the copy to the Clerk so that he may mark

(Testimony of Eugene Sanden.)

it as Exhibit No. 2, and if it is agreed that the paper so marked is a copy of Exhibit No. 2, the Court authorizes the withdrawal of the original and the substitution of the copy. Is that agreeable?

Mr. Paul Smith: Well, we won't agree it is a copy until we find out who copied it.

The Court: Well, we will cover the situation in this way. The Clerk will compare the papers stated by the attorney for the plaintiff to be a copy of Exhibit No. 2 with the original exhibit, and if found by him to be a true copy, the same will be substituted on the record for the original and the original will be returned by the Clerk to Mr. Sanden.

Mr. Paul Smith: That is all right.

Q. Mr. Sanden, I refer you to this cost of living commodity statement, Plaintiff's Exhibit No. 1, and I direct your attention to certain items appearing on page 3 thereof. It says, "turkish," next column, "CPS", next column, "colored", ".35". Under that appear six ditto marks; under "CPS" appear likewise six ditto marks; under the word "colored" appear likewise six ditto marks, and in the last column for the first item appears the price 35c, immediately under that, 45c, under that 59c, under that 89c, under that \$1, under that \$1.39, and under that \$1.50. I will first ask you what the word "turkish" refers to.

A. Turkish refers to towels, huck towels, and under it the word "turkish." "CPS" probably

(Testimony of Eugene Sanden.)

means Carson-Pirie-Scott, the source. It was undoubtedly impossible to give any lot number [146] on that lot number because they may have been on the shelf without any lot number on them. Our cost on them was cost and selling price and naturally, as you know, there are all kinds of turkish towels. You can get so many different sizes; you can get a very small size on up to a beach size three yards long and two yards wide, extra heavy. Those were identified to the best of my ability at the time.

Q. Do you know whether any effort was made to secure the lot number?

A. Effort was made right along to secure lot numbers. I know at times when it was impossible to find any further information I told those inquiring about it just skip it and put down the best they could.

Q. Now I refer you to the same exhibit on page 4, two items appearing thereon as pique.

A. That is right.

Q. —with no lot number or other description other than the fact “Pique”, manufacturer designated as “Robinson”, description “White”, and the price of one is 35c and the other 50c.

A. Different quality pique.

Q. Those would have been different qualities and they would have different lot numbers?

A. They would have different lot numbers.

Q. Referring to the same page of the exhibit

(Testimony of Eugene Sanden.)

with reference to cotton damask, of which there appears three items of cotton damask with the only description thereof "CPS" as manufacturer, description "White", one price 95c, one price 75c, and one price 89c.

A. That is correct.

Q. I will ask you whether or not there are three different [147] qualities in that?

A. Those are three different qualities, yes, sir.

Q. Referring to page 8 of Exhibit No. 1, with reference to the item muslin; three different items appear thereon and the only description "Butlers" is the manufacturer, description "36"?"

A. Yes, sir.

Q. The prices designated 22c and 19c. That would be two items?

A. Two different qualities.

Q. They would be two different lot numbers?

A. They wouldn't have the lot number on them probably; they might have had, and they might not have had, but they came in billed to us as two different numbers, yes, sir.

The Court: What does the lot number indicate?

A. The lot number is a number placed upon an article by the shipper. Might be the manufacturer, jobber, mill agent; just simply an arbitrary number in order to designate the article for their own record.

The Court: And for your record in dealing with that particular shipment?

(Testimony of Eugene Sanden.)

A. In checking the item in from the manufacturer or mill agent, yes, sir.

Q. Directing your attention to page 10 of Exhibit No. 1, with reference to dish towels, the description being "Dish Towels", "Kitchen Towel Co" manufacturer, "Colored", 25c; immediately under that is the second description with the price 19c.

A. Yes, sir; two different qualities.

Q. That would be two different lot numbers?

A. Yes, sir. [148]

Q. Referring to page 17—

A. —that might not be a lot number at all; in the case of kitchen towels they might just simply send one group, 500 or 1,000 pounds of this particular lot at a certain price, billing us as one lot of towels at a certain price.

Q. Directing your attention to page 17 of Exhibit No. 1 to the article "Mens Mackinaws", the description being "Mens Mackinaws", "Shankhouse" manufacturer, "Plaid"—

A. That is the design.

Q. —one price being \$8.95; same description underneath with the price \$17.95; third price \$15.95, same description; fourth price \$12.50, same description; next price \$9.50 of the same description. I will ask you whether or not those mackinaws are different qualities? A. Yes.

Q. They would have, likewise, different lot numbers?

(Testimony of Eugene Sanden.)

A. They would have different lot numbers, yes, sir.

Q. Now, Mr. Sanden, do you have the original of the warning notice?

A. Yes, I have; it is over there on the table.

Q. Mr. Sanden, I show you an instrument marked for identification as Plaintiff's Exhibit No. 3, and ask you what that is?

A. This is a letter from the Regional administrator, Clem W. Collins, notifying us of a failure to comply with the general maximum price regulation.

Q. Do you recall when you received that letter?

A. We received it, I think, shortly after the date here, January 14, 1943. I presume it would be two or three days after that; probably January 16th.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 3. [149]

PLAINTIFF'S EXHIBIT NO. 3

[Attached to letter]:

Inquiries with respect to this notice may be made by writing to Office of Price Administration, Hotel Placer Building, Helena, Montana, attention Mr. Wesley W. Wertz, State Enforcement Attorney.

Office of Price Administration

Region VII

Denver, Colorado

Warning Notice

(Testimony of Eugene Sanden.)

To: Sanden & Ferguson Company
111 North Main Street
Helena, Montana

By the provisions of Section 16 of the General Maximum Price Regulation you were granted a license as a condition of selling, at wholesale or retail, any commodity or commodities with respect to which such licensing provisions are applicable.

In the judgment of the undersigned, Regional Administrator of Region VII of the Office of Price Administration:

1. You failed to prepare on or before July 1, 1942 and keep for examination a statement showing the highest prices charged by you for those commodities for which maximum prices are established by the General Maximum Price Regulation and which you delivered during the month of March, 1942, and showing the prices at which you offered to deliver such commodities during that month, together with an appropriate description or identification of each such commodity, thereby violating Section 11 (b) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

2. You failed to file on or before July 1, 1942, with your War Price and Rationing Board a statement showing your maximum price for each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (b) of the Gen-

(Testimony of Eugene Sanden.)

eral Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

3. You failed on or about December 28, 1942, to have posted or marked in your premises in a manner plainly visible to and understandable by the purchasing public, the maximum price of each cost-of-living commodity offered for sale by you at retail, thereby violating Section 13 (a) of the General Maximum Price Regulation and the provisions of the license granted you under Section 16 of the General Maximum Price Regulation.

Notice is further given if, after receipt of this warning notice, you violate any provisions of your license, or any provisions of any regulations, incidental order, or requirement with respect to which your license is applicable, proceedings may be instituted in a court of competent jurisdiction for an order suspending your license to sell at wholesale or retail any commodities to which your license is applicable.

This warning notice is sent to you pursuant to the provisions of Section 205 (f) (2) of the Emergency Price Control Act of 1942 and under the authority conferred upon the Regional Administrator by General Order No. 27 (7 F. R. 5480, 8797, 9053, and 9908).

January 14, 1943.

CLEM W. COLLINS,

Regional Administrator.

[Endorsed]: Filed Jan. 15, 1944.

(Testimony of Eugene Sanden.)

Mr. Paul Smith: Objected to on the ground it is incompetent, irrelevant, and immaterial; has no bearing on the issues involved in this case.

The Court: Objection overruled. As I recall it the receipt of that warning notice, so-called, is admitted in the pleadings, isn't it? The same will be admitted in evidence and the objection is overruled pro forma.

Q. Mr. Sanden, after you received this warning notice and during the month of January, did you and your sister Florence MacPherson call upon the Price Division of the OPA?

A. Yes, we did.

Q. Did you obtain certain information with regard to preparing base period statements and cost of living commodities? A. We did.

Q. Do you recall who you saw at that time?

A. Well, I had gone previously, I believe, to see Mr. Wertz, and then later we went to see Mr. Anderson and this gentleman back here; I can't tell you his name.

Q. Mr. McDermott?

A. That's right; they were in the office together when we went in.

Q. You did have a conversation with them at that time? A. Yes, we did.

Q. They advised you as to what was necessary to be done in the preparation of the base period statement?

A. Yes, they did the best they could to inform us what to do.

(Testimony of Eugene Sanden.)

Q. They also advised you as to how the prices should be posted of cost of living commodities?

A. Well, I don't think that was taken up. I think what we wanted to find out was how to go about the preparation of this [150] cost of living commodity and basic price list because that was why my sister was along with me; she was going to do the work and we wanted the information and I think that was all discussed at the time; I don't recall anything else discussed.

Q. Did you receive a pamphlet or book at that time from either Mr. Anderson or Mr. McDermott on how to prepare your base period statement and cost of living commodity statement?

A. Yes, they gave us one of these booklets.

Q. Mr. Sanden, I hand you a pamphlet marked for identification as Plaintiff's Exhibit No. 4 and ask you if that is a copy of the pamphlet you received?

A. Yes, this is a copy of it.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 4 for identification.

Mr. Paul Smith: Objected to on the ground that it is incompetent, irrelevant, and immaterial; has no bearing upon the issues involved in this case; that it does not conform to the Emergency Price Control Act of 1942 in that this regulation exceeds the authority granted by the Emergency Price Control Act of 1942 to the Price Administrator. We object to it on the ground it is unconstitutional, contrary to the provisions of Article I, Paragraph I of the Constitution of the United States in that

(Testimony of Eugene Sanden.)

it is a usurpation upon the power of Congress and is illegal legislation. Said regulation is contrary to the provisions of Amendment Five of the Constitution of the United States—deprived of liberty without due process of law.

The Court: The objection will be overruled and Exhibit No. 4 admitted in evidence.

Mr. Wohl: That is all.

Mr. Smith: No cross-examination. [151]

DORA C. CLARK,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wohl:

Q. By whom are you employed, Miss Clark?

A. The Office of Price Administration.

Q. In what capacity? A. As Investigator.

Q. How long have you been so employed?

A. Since February 1, 1943.

Q. Will you state generally just what your duties as an investigator are?

A. My duties are to investigate compliance of the regulations of the Office of Price Administration.

Q. During the month of March, 1943, did you conduct such an investigation in Sanden and Ferguson Company in Helena, Montana?

A. I assisted in conducting that investigation.

Q. Who did you assist?

(Testimony of Dora C. Clark.)

A. Donald L. Creel.

Q. Who is Mr. Creel?

A. He is also an investigator for the Office of Price Administration.

Q. During the investigation and in the course of your investigation did you examine the March, 1942, sales slips issued by the Sanden and Ferguson Company?

Mr. Paul Smith: Objected to on the ground it is incompetent, irrelevant, and immaterial; has no bearing on the issues involved in this case; no provision in the Emergency Price Control Act establishing March, 1942, as a period upon which maximum prices could be established.

The Court: As I understand it, he is dealing with 1943. [152]

Mr. Wohl: I asked her if she had made an investigation of the March, 1942, sales slips; that is the base period on which they were to calculate.

The Court: How does she know they were the 1942 sales slips?

Q. During the course of your investigation that you made in March, 1943, did you examine certain sales slips issued by Sanden and Ferguson Company?

Mr. Paul Smith: Objected to; the witness is not qualified to testify.

The Court: We will let her tell us what she did.

A. Yes, I did.

The Court: The objection to that question was sustained. Just let her tell us what she did. I want to know what you did, how, and why.

(Testimony of Dora C. Clark.)

A. Mr. Creel and I entered Sanden and Ferguson Company's store on March 23, 1943, and asked for the person in charge. We were directed by the bookkeeper to Mr. Eugene Sanden, and we asked Mr. Sanden if we could examine all of his March, 1942, sales slips and he directed us to Inga M. Elertson, the bookkeeper, and she secured these March, 1942, cash and credit sales slips for us.

Q. Did you examine any other sales slips at that time for any other month?

A. We examined sales slips for April, 1942, and also for February, 1943.

Q. Did you examine any purchase invoices?

A. Yes, we did.

Q. Covering what period?

A. From September 1, 1941, through up to the date that we were in the store in March, 1943. [153]

Q. Now would you relate just how you conducted the examination of the March, 1942 sales slips?

A. Each day's slips were tied in separate bundles; the cash slips were tied separate from the credit slips. And we decided to take out the sales slips for certain items and I thumbed through these slips for these items we were taking the slips for and handed them to Mr. Creel who read them over and tabulated all the information from the slips on to a chart.

Q. During the course of your investigation did you make an inspection of the store of Sanden and Ferguson Company to determine whether the maximum prices of cost of living commodities had been marked or posted in the store?

A. Yes, I did.

(Testimony of Dora C. Clark.)

Q. What was the result of that inspection?

Mr. Paul Smith: Objected to on the ground it is incompetent, irrelevant, and immaterial; has no bearing upon the issues in this case.

The Court: The Court merely suggested she tell us what she did.

A. Mr. Creel and I inspected the store and found——

The Court: I want to know just what you did; I will draw the conclusions. Just tell me what you did.

A. There was no ceiling price or maximum price posted.

Mr. Paul Smith: Objected to as a conclusion and not responsive to the question.

The Court: Yes. What did you do in making your inspection of the premises and what did you find or fail to find? Just what did you do? Did you stand at the corner of the desk, or did you go from table to table?

A. Walked from table to table. [154]

Q. And tell us what you did?

The Court: What did you do at these tables?

A. I looked for the ceiling price or maximum price on the articles that were being sold or offered for sale at Sanden and Ferguson Company's store, and I was unable to find any ceiling or maximum price for such items of yard goods as jersey, shark-skin, Indian head and ticking; for all bedspreads; Wamsutta, Glengarry, and Sonoma brand of bed

(Testimony of Dora C. Clark.)

sheets; for women's and girl's dresses; women's skirts; men's overalls; and also for children's hosiery and children's gloves, and for the majority of the men's work pants.

Q. Did you go entirely through the store to determine whether or not those prices were posted any place in the store? A. Yes, we did.

Q. During the course of this investigation did you go through the store to see if selling prices were posted for certain items? A. Yes.

Q. And in connection with that inspection did you inquire of any of the clerks in the store as to the selling price of commodities?

A. Yes, I did.

Q. And I will ask you whether or not you inquired as to the selling price of gingham, a yard goods?

A. I asked Mrs. Lydia Clark, a clerk in the yard goods department, the selling price of gingham and she advised me they were selling it for 39c a yard.

Q. Did you inquire as to the selling price of denim?

A. I did. I asked Mrs. Clark about the selling price for denim and she advised me—— [155]

Mr. Paul Smith: We object to this line of testimony on the ground it is not properly identified as to grades and qualities, and widths and lengths and classes.

The Court: Complete the answer. The objection will be overruled.

A. She advised me they were selling two items

(Testimony of Dora C. Clark.)

of denim, one colored denim at 45c a yard, and the other, blue overall denim, at 35c a yard.

Q. Did you inquire as to the selling price of challis, a yard goods?

A. Mrs. Clark advised me they were selling challis at 32c a yard.

Q. Did you inquire as to the selling price of jersey, a yard goods?

A. Mrs. Clark advised me they were selling rayon jersey in plain colors at \$1.65 a yard, and in prints or pattern at \$1.69 a yard.

Q. Did you inquire as to the selling price of Indian Head, a yard goods?

A. Mrs. Clark advised me they were selling three brands of Indian Head listed on their cost of living commodity statement, and these were colored Indian Head, 50c a yard; 44 inch width Indian Head at 49c a yard; and 54 inch width Indian head at 59c a yard.

Q. Did you inquire as to the selling price of burlap, a yard goods?

A. Yes, Mrs. Clark advised me they had burlap on sale at 45c a yard.

Q. During your inspection of the store did you find any posted selling price for spun rayon, a yard goods? [156]

A. Yes, I observed that the bolts of spun rayon were displayed on tables, and on this table with the bolts of spun rayon was a tee standard upon which was a card with the following writing: "Spun rayon, ceiling price, 79c." Further inspection of

(Testimony of Dora C. Clark.)

the bolts of spun rayon revealed the price 89c was written on the ends of the bolts.

Q. Did you inquire at that time as to the selling price of ticking, a yard goods?

A. Yes, Mrs. Clark advised me they had four grades of ticking, one at 49c a yard; one at 65c a yard; and two at 69c a yard.

Q. In your inspection of the store did you see whether or not there were any posted selling prices for percale, a yard goods?

A. The bolts of percale were also displayed on a table. On this table was a tee standard that had 35c and a line marked through 35c and below it 33c.

Q. At the time you made this inspection did you learn whether or not canvas was being sold in the store?

A. Yes, Mrs. Clark advised me they were selling canvas, cotton canvas, at 35c a yard.

The Court: Was that one of the articles involved in the pleadings here?

Mr. Wohl: We haven't listed it specifically.

The Court: I don't recall any canvas mentioned.

Mr. Wohl: We had the general allegation the cost of living commodity was not complete; just for the purpose of showing they were selling canvas and they had not listed it in their cost of living statement.

The Court: Very well; received on that theory.

Mr. Wohl: That is all.

Mr. Smith: No cross-examination. [157]

DONALD I. CREEL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wohl:

Q. Your name is Donald I. Creel?

A. Yes.

Q. By whom are you employed?

A. By the Office of Price Administration.

Q. How long have you been employed by the Office of Price Administration?

A. Since October 7, 1942.

Q. In what capacity?

A. As an investigator.

Q. During the month of March, 1943, did you assist in making an investigation of Sanden and Ferguson Company, Helena, Montana?

A. Yes, I did.

Q. Who did you assist in that?

A. Dora Clark.

Q. Are you acquainted with Eugene Sanden?

A. Yes.

Q. Did you inquire of Eugene Sanden at any time for the right to examine certain sales slips issued by Sanden and Ferguson Company?

A. Yes, I did.

Q. Would you just relate when that occurred?

A. That was on March 23, 1943.

Q. What took place?

A. I asked Mr. Sanden if we could examine his March, 1942 sales slips and he said we could.

(Testimony of Donald I. Creel.)

Mr. Paul Smith: We would like to interpose the same objection [158] to this testimony.

The Court: Very well; the same ruling under the same conditions. Proceed.

A. —Mr. Sanden said we could examine the sales slips and referred us to his bookkeeper who got the sales slips for us.

Q. And the sales slips you requested were for what month?

A. We requested the sales slips for March, 1942, for April, 1942, and February, 1943.

Q. Did you make a like request for any purchase invoices?

A. Yes, we made a request for the purchase invoices from September 1, 1941 up to that date, the latter part of March, 1943.

Q. Did you participate in making the examination of the March 1942, sales slips?

A. Yes, I did.

Q. Would you just relate how that examination was made?

A. Miss Clark sorted through the sales slips and took out the ones that we wanted and she handed those to me and I tabulated that information.

The Court: How did you determine which ones were the sales slips you wanted?

A. We just picked out the articles as they appeared on the sales slip; we didn't take them all. We took articles that we thought were easily identified.

(Testimony of Donald I. Creel.)

The Court: As I recall your answer,—“we picked out the sales slips we wanted.” What I want to know is why you wanted these particular sales slips?

A. We didn't want any particular sales slip; we chose only part of the items that were listed on the sales slips.

Q. State whether or not you had decided to examine the sales [159] slips as to the prices of certain commodities? A. Yes, that is true.

Q. We have made demand upon the Defendant to produce the March, 1942, sales slips. I will ask counsel if these are all the March, 1942, sales slips? Mr. Creel, do you know about how many March, 1942, sales slips you examined?

A. I didn't count the sales slips; I would judge there was approximately 1500.

Q. And did you make true and correct notes of each sales slip at that time?

A. Yes, I did.

Q. Would you be able to tell us without your notes as to the result of your examination?

A. No, I would not.

Q. You have your notes with you?

A. Yes, sir.

Q. You made those notes? Do you have those notes here? A. Yes, I have those notes.

Q. When did you make those notes?

A. I made them during the investigation.

Q. Right at that time?

A. Right at that time.

(Testimony of Donald I. Creel.)

Q. Are they in the same condition they were at the time you made them? A. Yes, sir.

Q. I will ask you whether or not the examination of the sales slips showed the sales in March, 1942, of gingham, a yard goods.

Mr. Paul Smith: Objected to as leading. [160]

The Court: It is leading, but it is merely a base on which he expects to proceed. Overruled.

A. Yes.

Q. Do you remember what the highest price was at which gingham sold for during the month of March, 1942, as evidenced by the examination of the 1942 sales slips?

Mr. Paul Smith: Objected to as incompetent, irrelevant, and immaterial. Also that the witness is not qualified to answer. Also objected to on the ground that the items are not identified; it is not the best evidence.

Mr. Wohl: If the Court please, I believe the law is that where you have examined a great many records and you only wish to introduce the result of the examination that the witness can testify as to the result. Now the witness has testified, I believe, that there are some 1500 March sales slips, and my question was whether or not the examination disclosed the sale of gingham during the month of March, 1942.

Mr. Paul Smith: We also object on the ground it is calling for the conclusion of the witness; it is not the best evidence. It is his opinion, if the Court please.

(Testimony of Donald I. Creel.)

The Court: Well, he is dealing now with generalities,—did the sales slips indicate sales of gingham during the specified month. In a way it is an opinion; it is his conclusion. It is like examination of books by a bank cashier; he can tell us generally what he found and if one wishes to deal with particular items or figures, they may develop that phase of the question on cross-examination. That is the purpose of cross-examination; it is to clear what is left uncertain on direct examination. The objection will be overruled.

(Question read by the reporter.) [161]

A. I would have to refer to my notes.

Q. Would you refer to your notes?

A. The highest price for gingham during the month of March, 1942, as shown by an examination of the sales slips was 35c.

Q. Per what? A. Per yard.

The Court: Does it show the quality or width of the article?

A. No.

The Court: Does it show the color?

A. No.

Q. Mr. Creel, I omitted to ask you whether or not the sales slips—whether the commodity sold appearing in writing on the sales slips so that it could be identified by the sales slips?

A. By name, yes—

Mr. Paul Smith: We object to this line of testimony. Also the witness hasn't qualified himself

(Testimony of Donald I. Creel.)

to testify as to the different classes and grades and is not the best evidence.

Mr. Wohl: We are not trying to distinguish——

The Court: It is clearly not the best evidence. He examined the slips: you asked him for his opinion; whether certain things could be ascertained from it. That is really the function of the Judge. He said he examined the exhibit and he determined what was on it. So the objection that it is not the best evidence appears to me to be sound. You have the sales slips here in Court. It is now time for the noon recess and we will stand in recess until two o'clock this afternoon. During the noon recess you may examine the sales slips and pick out the ones he wants and do away with the objection on the ground it is not the best evidence. The Court will stand in recess until two [162] o'clock this afternoon.

(At this point the Court stood in recess for the noon hour and reconvened at two o'clock in the afternoon on the same day at which time the following proceedings were held:)

Q. (By Mr. Wohl. Mr. Creel still on the stand): Mr. Creel, in your examination of the March, 1942, sales slips how many sales slips did you find evidencing sales of gingham, a yard goods?

A. May I refer to my notes for that?

Q. Yes. A. Six.

Mr. Wohl: If the Court please, we have some sixty sales slips evidencing sales of these various

(Testimony of Donald I. Creel.)

yard goods. I wonder if we could group them together according to commodity for convenience?

The Court: I think so; I can see no objection to it. You will have to identify them as the sales slips taken from the Defendant.

Mr. Paul Smith: Would that necessarily mean we would have to object to the whole group? We want to reserve the right to object to any individual slip introduced.

The Court: You, of course, would have that right, but they can be marked as one exhibit, then the examination can be directed to the specific sales slip.

Mr. Paul Smith: If the Court please, could we have the understanding also that it will not be necessary to copy all of these exhibits into the record?

The Court: Well, that may be understood; the record would run entirely too large if they had to be copied.

Mr. Paul Smith: If it is agreeable to counsel for the Plaintiff?

Mr. Wohl: That's agreeable with the Plaintiff.

The Court: Let the record show that by agreement of the parties [163] expressed in open court it was ordered that in the preparation of the transcript of the proceedings of the trial it will not be necessary to incorporate therein the exhibits introduced in evidence, or any of them, or offered in evidence, or any of them.

(Testimony of Donald I. Creel.)

Q. Mr. Creel, I hand you an exhibit marked Plaintiff's Exhibit No. 5 for identification, consisting of six papers grouped together into one exhibit, and ask you what those are?

A. Those are the sales slips for March, 1942, representing the sale of gingham.

Q. I direct your attention to the fourth slip and the sixth sales slips upon which appear the word "gin". Did you inquire of anyone in Sanden and Ferguson Company what the word "gin" meant?

A. Yes, I inquired of Mrs. Clark.

Q. What did she say?

A. She said it referred to gingham.

Q. Who is Mrs. Clark?

A. Clerk in the yard goods department.

Mr. Wohl: At this time we offer in evidence Plaintiff's Exhibit No. 5.

Mr. David Smith: To which, if the Court please, we object to the introduction of the whole group or any one of said group on the ground that these slips have not been properly identified as to the specific goods or the articles themselves, classes, widths, lengths, colors, and grade thereof; have not been identified as to the exact article purchased, the purchaser, or the agent of the seller, and are incompetent, irrelevant, and immaterial.

The Court: Well, they haven't been identified as having come from the sales slips produced by the Defendant on request of the Plaintiff. [164]

Mr. Wohl: You will admit these are the sales slips you brought here in answer to our notice to produce?

(Testimony of Donald L. Creel.)

Mr. David Smith: Yes, that was not what I objected to. Those slips were pulled out of that box; we will admit these were part of the slips that were contained in the slips that were brought up by Mr. Sanden.

Mr. Wohl: You will admit these are the March, 1942, sales slips of Sanden and Ferguson Company?

Mr. David Smith: Yes, I will admit that.

The Court: The objection will be overruled.

Q. Mr. Creel, did you make an examination of the cost of living statement filed by Sanden and Ferguson Company with the War Price and Ration Board at Helena, Montana?

A. Yes, I did.

Q. Would you be able to determine whether or not gingham, a yard goods, was listed in the cost of living commodity statement? A. Yes.

Q. Do you know whether the gingham is listed in the cost of living commodity statement?

A. Yes.

Q. Handing you Plaintiff's Exhibit No. 1, I will ask you if you will turn to the part in the cost of living commodity statement where gingham, a yard goods, is listed?

A. It is on this page.

Q. You are referring to page 4 of the Exhibit No. 1? A. Yes.

Q. And are you pointing to the item marked gingham under the word "article", and "Golden Rod" under the word "Style No.", and "Carsons" under the word "Manuf.", with the maximum price [165] of 39c? A. Yes.

(Testimony of Donald I. Creel.)

Q. State whether or not you were able to find any other gingham as yard goods listed in the cost of living commodity statement.

Mr. Paul Smith: Objected to on the ground it is incompetent, irrelevant, and immaterial. Also that the witness has not qualified himself to testify as to these articles or what this merchandise consists of or what it pertains to. He has not qualified himself as to the knowledge necessary to testify as to the contents of the statement. Also with reference to these particular sales slips, or any other sales slips, the slips have not been identified at all with the price list; also as to quality, class, size, color, and so forth.

The Court: I take it you can read. Can you read?

A. Yes, sir.

The Court: Overruled.

(Question read by the reporter.)

A. No.

Q. Mr. Creel, handing you Plaintiff's Exhibit No. 6 for identification, an exhibit consisting of three slips of paper, and I ask you what that is?

A. Those are the sales slips representing sales of gingham during the month of February, 1943.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 6.

Mr. David Smith: If the Court please, we offer the same objection to these slips as were made as to the other slips just received and introduced as

(Testimony of Donald L. Creel.)

a group. Also that these particular slips have not been identified as to date.

The Court: Do they bear date upon their face?

[166]

Mr. Wohl: They do.

Mr. David Smith: The date, if Your Honor please, is written differently, with a different pencil.

Mr. Wohl: We made a demand upon you to produce these records and these are the records you furnished in response to the demand. Do you admit these are your February, 1943, sales slips issued by Sanden and Ferguson Company? Is that correct?

Mr. David Smith: Yes.

The Court: Let the record show it is so admitted.

Q. Mr. Creel, in your investigation or examination of the March, 1942 sales slips did you find any sales of denim, a yard goods? A. Yes.

Q. Do you know how many sales slips for denim you found?

A. During March, 1942, there were two sales of denim.

Q. I hand you Plaintiff's Exhibit No. 7 for identification, an exhibit consisting of two slips and ask you what those are?

A. Those are the sales slips that represent the sales during March of denim.

Q. Are those the only sales slips you were able

(Testimony of Donald I. Creel.)

to find in your examination of the 1942 sales slips?

A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 7.

Mr. David Smith: Objected to on the same grounds as the other sales slips; not properly identified as to class, color, material, and parties involved. There is no definite connection between the articles set forth in the sales slips and those in the list.

The Court: Overruled.

Q. Mr. Creel, did you make an examination of the February, 1943, sales slips to determine whether any sales of denim were made [167] during that month?

A. Yes, I did.

Q. I hand you Plaintiff's Exhibit No. 8 for identification, an exhibit consisting of six slips and ask you what that is?

A. Those are the slips that cover the sales of denim during the month of February, 1943.

Mr. Wohl: At this time we offer in evidence Plaintiff's Exhibit No. 8.

Mr. David Smith: Same objection.

The Court: Overruled.

Q. Mr. Creel, did you make a search of the cost of living commodity statement filed by the Defendant to determine whether it had listed denim on that statement?

A. Yes, I did.

Q. Can you point out on the statement where denim is listed?

A. Denim is listed on page 9.

(Testimony of Donald L. Creel.)

Q. On page 9 you have indicated two items of denim, one No. 5028, manufacturer, "Schenck", a colored denim, maximum price 45c; and an overall denim, manufacturer "Butler", the color blue, maximum price 35c? A. Yes.

Q. Are those the only two denims you were able to locate in the cost of living commodity statement? A. Yes.

Q. Did you examine the March, 1942 sales slips to determine whether challis, a yard goods, had been sold during that month?

A. Yes, I did.

Q. Can you tell how many sales of Challis had been made during the month of March, 1942?

A. There was one sale made. [168]

Q. I hand you Plaintiff's Exhibit No. 9 for identification and ask you what that is?

A. That is the sales slip for the sale of challis made during March, 1942.

Q. Did you find any other sales slip evidencing the sale of challis in March, 1942?

A. No.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 9.

Mr. David Smith: Objected to on the same ground.

The Court: Overruled.

Q. Did you examine the Defendant's cost of living commodity statement filed with the local board to determine whether challis was listed therein? A. Yes, I did.

(Testimony of Donald I. Creel.)

Q. Can you point out in the statement where challis is listed?

A. That is also listed on page 9.

Q. Now you have designated a word "Chali", "Style-Lot", "5904", manufacturer, "CPS", and ditto marks under the word "Figured", with the maximum price 32c? A. Yes.

Q. Were you able to find any other challis listed in the cost of living commodity statement?

A. No.

Q. In your examination of the March, 1942, sales slips were you able to find any sales of spun rayon, a yard goods? A. Yes, I did.

Q. How many did you find?

A. During March, 1942, there were two sales.

Q. I hand you Plaintiff's Exhibit No. 10 for identification, an exhibit consisting of two sales slips, and ask you what the [169] exhibit is?

A. Those are the two sales slips representing the sales of spun rayon during March, 1942.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 10.

Mr. David Smith: Same objection.

The Court: Overruled.

Q. Did you make a search of the cost of living commodity statement filed by the Defendant to determine whether spun rayon had been listed therein? A. Yes, I did.

Q. Were you able to find the listing therein?

A. No, I was not.

(Testimony of Donald L. Creel.)

Q. In your examination of the February, 1943, sales slips were you able to find any sales of spun rayon?

A. Yes; I found two sales.

Q. I hand you Plaintiff's Exhibit No. 11 for identification, an exhibit consisting of two slips, and ask you what the exhibit is?

A. Those are the two sales slips representing the sales of spun rayon during February, 1943.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 11.

Mr. Paul Smith: Objected to on the same ground.

The Court: Overruled.

Q. In your examination of the March, 1942, sales slips, were you able to find any sales of eyelet, a yard goods, during the month of March, 1942?

A. Yes; I found one sale in March, 1942.

Q. I hand you Plaintiff's Exhibit No. 12 for identification and ask you what that is?

A. That is the slip covering that sale in March, 1942. [170]

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 12.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. Did you make a search of the Defendant's cost of living commodity statement to determine whether eyelet had been listed therein?

A. Yes.

Q. Were you able to find it listed therein?

(Testimony of Donald I. Creel.)

A. I believe it was; it is listed on page 3.

Q. Now you are referring to an article marked "Eyelette", manufacturer, "Robinsons", description, "White", having a maximum price of \$1?

A. Yes.

Q. Were you able to find any other eyelet listed in the cost of living commodity statement?

A. No, I was not.

Q. In your examination of the March, 1942, sales slips, did you find any sales of gabardine, a yard goods?

A. Yes; there were four sales in March, 1942.

Q. I hand you Plaintiff's Exhibit No. 13 for identification, consisting of four sales slips, and ask you what that is?

A. Those are the sales slips representing the sales of gabardine in March, 1942.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 13.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. In your examination of the February, 1943, sales slips did you find any sales of gabardine above the price of 85c per yard?

A. Yes, I did.

Q. How many such sales did you find? [171]

A. There were seven at \$1; one at \$1.39; and there was one sale at 89c. I beg your pardon, that was two sales at 89c.

Q. I hand you Plaintiff's Exhibit No. 14 for

(Testimony of Donald I. Creel.)

identification, consisting of ten sales slips, and ask you what those are—what the exhibit is?

A. Those are some of the sales slips that represent sales during February, 1943.

Q. Are those the sales slips you testified to that were made in excess of 85c per yard.

A. Yes, sir.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 14.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. Did you make a search of the Defendant's cost of living commodity statement to determine whether gabardine, a yard goods, was listed therein?

A. Yes, I did.

Q. Would you point out where it is listed?

A. It is listed on page 3.

Q. You now refer to page 3 of Exhibit No. 1 where it says article, "Gabardine", manufacturer, "Belding", description, "Plain", maximum price, 89c; and the second gabardine by "Belding", manufacturer, marked "Plain", with the maximum price \$1.19?

A. Yes.

Q. Now were you able to find any other gabardine, a yard goods, in the cost of living commodity statement?

A. No.

Q. In your investigation of the March, 1942, sales slips did you find any sales of jersey, a yard goods? [172]

A. Yes.

Q. How many did you find?

A. There were five sales in March, 1942.

(Testimony of Donald I. Creel.)

Q. I hand you Plaintiff's Exhibit No. 15 for identification, consisting of four slips, and ask you what that exhibit is?

A. Those are sales slips that cover sales of jersey in March, 1942?

Q. Now is there a fifth sales slip that you examined that does not appear in this exhibit?

A. Yes, there is.

Q. Do you have any notes as to the number of that sales slip? A. Yes, I do.

Q. What is the number of that sales slip?

A. The number of the slip was twelve (12).

Q. During the noon hour did you make a search for that sales slip among the sales slips here tendered by the defendant? A. Yes.

Q. Were you able to find that sales slip?

A. No, I was not.

Q. Do you have notes showing the contents of that sales slip? A. Yes, I do.

Q. What was the contents of that slip?

A. It showed the slip was marked——

Mr. Paul Smith: Objected to as not the best evidence.

The Court: He made a search for it and can't find it, so I guess we will have to do the best we can with what we have.

A. ——the slip was dated March 23, 1942, for three yards of jersey at \$1.65 a yard. Total amount of the sale was \$4.95. The Clerk was No. 9; the sale was made to Vera Wilson.

(Testimony of Donald L. Creel.)

Q. Did it give her address? [173]

A. 700 North Benton.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 15.

Mr. Paul Smith: Objected to on the same ground.

The Court: Overruled. In evidence.

Q. In your examination of the February, 1943, sales slips did you find any sales of jersey?

A. Yes, I did.

Q. How many? A. Sixteen sales.

Q. Did you find any sales in February, 1943, in excess of \$1.65 per yard?

A. Yes, there were eleven sales at \$1.69.

Q. I hand you Plaintiff's Exhibit No. 16 for identification, consisting of ten slips, and ask you what the exhibit is?

A. Those are sales slips that represent sales of jersey in February, 1943.

Q. In excess of \$1.65 per yard? A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 16.

Mr. Paul Smith: Same objection.

The Court: Overruled; in evidence.

Q. Mr. Creel, did you make a search of the Defendant's cost of living commodity statement to determine whether jersey was listed therein?

A. Yes, I did.

Q. Were you able to find it listed therein?

A. No, I was not.

(Testimony of Donald I. Creel.)

Q. In your examination of the 1942 sales slips did you find any sales of Indian head, a yard goods?

A. Yes. [174]

Q. How many?

A. There were six sales during March, 1942.

Q. I hand you Plaintiff's Exhibit No. 17 for identification, an exhibit consisting of six slips, and ask you what it is?

A. Those are the sales slips representing sales of Indian head for March, 1942.

Q. Are those the only sales you were able to find during that month? A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 17.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. In your examination of the February, 1943, sales slips did you find any sales of Indian head, a yard goods, in excess of 42c per yard?

A. Yes.

Q. How many?

A. There were six sales in excess of 42c a yard.

Q. I hand you Plaintiff's Exhibit No. 18 for identification, an exhibit consisting of six slips, and ask you what it is?

A. Those are the sales slips representing sales of Indian head in February, 1943.

Q. In excess of 42c?

A. In excess of 42c.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 18.

(Testimony of Donald L. Creel.)

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. Did you make a search of the Defendant's cost of living commodity statement to determine whether Indian Head was listed therein?

A. Yes, I did. [175]

Q. Was it listed? A. I believe it was.

Q. Can you point out in the statement where it is listed? A. Page 4.

Q. You are now designating page 4 of Exhibit No. 1, the word "Indian," and the letter "H", manufacturer, "Butlers", description. "White", and after that the number 44, with the maximum price 49c? A. Yes.

Q. Beneath that, ditto marks under "Indian H.", likewise under "Butlers", manufacturer, and the description "White", and the number 54, with the maximum price 59c? A. Yes.

Q. Are those the only two you were able to find of Indian Head? A. Yes.

Q. During your examination of the March, 1942, sales slips did you find any sales of percale, a yard goods? A. Yes.

Q. How many sales did you find?

A. There were nineteen sales during March.

Q. I hand you Plaintiff's Exhibit No. 19 for identification, consisting of nineteen slips, and ask you what that is?

A. Those are the sales slips for March, 1942, covering sales of percale.

(Testimony of Donald I. Creel.)

Q. Are those the sales slips you testified to as having examined? A. Yes.

Q. Those were the only sales slips you were able to find covering sales of percale? A. Yes.

[176]

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 19.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. In your examination of the February, 1943, sales slips did you find any sales slip of sales in excess of 29c per yard? A. Yes, there were.

Q. How many were there?

A. There were twenty-five.

Q. I hand you Plaintiff's Exhibit No. 20 for identification, consisting of ten slips of paper and ask you what the exhibit is?

A. Those are some of the sales of percale during the month of February, 1943.

Q. In excess of the sum of 29c per yard.

A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 20.

Mr. Paul Smith: Objected to on the same ground.

The Court: Overruled. In evidence.

Q. Did you examine the Defendant's cost of living commodity statement to determine whether percale was listed therein? A. Yes, I did.

Q. Could you designate where it is listed?

A. It is on page 4.

(Testimony of Donald L. Creel.)

Q. You are referring to page 4 of Exhibit No. 1, the word "Plain Perc", style number, "Golden Star", manufacturer, "Rice-Stix", description "80 Sq.", maximum price 35c per yard? A. Yes.

Q. Were you able to find any percale listed any other place in Exhibit No. 1? [177] A. No.

Q. During your investigation of the March, 1942, sales slips were you able to find any sales of ticking, a yard goods? A. Yes.

Q. How many?

A. There were six sales in March, 1942.

Q. I hand you Plaintiff's Exhibit No. 21 for identification, consisting of six slips of paper and ask you what it is?

A. Those represent the six sales of ticking made in March, 1942.

Mr. Wohl: At this time we offer in evidence Plaintiff's Exhibit No. 21.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. Did you make a search of the cost of living commodity statement to determine whether ticking was listed in it? A. Yes.

Q. Could you point out where it is listed.

A. It is on page 9.

Q. You are referring to page 9 of Exhibit No. 1; you have indicated the word "Ticking", under the word "Article", and style lot number 4388, manufacturer "Mitchell F", description, "Colored", maximum price 65c? A. Yes, sir.

(Testimony of Donald I. Creel.)

Q. You have also designated on the same page toward the end thereof three items marked "ticking", one style lot number "Amoskeig", manufacturer "Butlers", description "Plain", maximum price 35c. The second ticking style lot number 4504, manufacturer "CPS", description "Plain", with the maximum price 69c; and the third ticking the style lot says "Short [178] Length", manufacturer "CPS", description "Striped", maximum price 69c.

A. Yes.

Q. Are those the only tickings you were able to find in the cost of living commodity statement?

A. Yes.

Q. During your examination of the March, 1942, sales slips did you find any sales of burlap, a yard goods?

A. Yes, I found two sales.

Q. I hand you Plaintiff's Exhibit No. 22 for identification, consisting of two slips, and ask you what that is?

A. Those are the two slips covering the sales of burlap in March, 1942.

Q. Were those all of the sales slips you were able to find for sales of burlap, a yard goods?

A. Yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 22.

Mr. Paul Smith: Same objection.

The Court: Overruled.

Q. Did you examine Defendant's cost of living commodity statement to determine whether burlap was listed on it?

(Testimony of Donald L. Creel.)

A. As I recall it, it was not listed.

Q. I hand you Plaintiff's Exhibit No. 23 for identification, consisting of four slips, and ask you what that is?

A. Those four slips represent the sale of overalls during February, 1943, at \$3 a pair.

Q. Did you examine Defendant's cost of living commodity statement to determine whether overalls were listed therein?

A. Yes, I did.

Q. Could you point out where they are listed?

[179]

A. They are listed on page 15.

Mr. Wohl: At this time we offer in evidence Plaintiff's Exhibit No. 23.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. You are now referring to page 15 of Exhibit No. 1, on which appears the word "Overalls", manufacturer "Crown Special", description "Extra Heavy", maximum price \$1.50. A second overall, manufacturer "Long Wear", description "Extra Heavy", maximum price \$1.50. A third overall, manufacturer "Headlight", description "Extra Heavy", maximum price \$1.50. A fourth overall manufacturer "Headlight", description "Bib Large", maximum price \$2. Another overall, manufacturer "Headlight", description "Bib Large", maximum price \$2.50. Another overall, manufacturer "Ruff Rider", description "Waist", maximum price \$1.50. A further overall, manufacturer

(Testimony of Donald I. Creel.)

“Calf Skin”, description “Bib”, maximum price \$1.50. A further overall, manufacturer “Red Kab”, description “Bib”, maximum price \$1.50. Is that all you referred to as the overalls listed in Exhibit No. 1? A. Yes.

Q. Were you able to find any other overalls listed therein? A. No.

Q. I hand you Plaintiff’s Exhibit No. 24 for identification and ask you what that is?

A. That is sales slips representing the sale of five yards of sateen, 59c a yard, February 19, 1943.

Q. Did you make a search of the Defendant’s cost of living commodity statement to determine whether sateen, a yard goods, was listed therein?

A. Yes, I did [180]

Q. And was it so listed?

A. I believe it was.

Q. Could you point out where it is listed?

A. It is listed on page 4.

Q. You are now referring to page 4 of Exhibit No. 1, referring to the item marked “Sateen”, manufacturer “Robinsons”, description “Colors”, maximum price 45c? A. Yes.

Q. Were you able to find any other sateen listed in the cost of living commodity statement?

A. No.

Mr. Wohl: At this time we ask leave to offer Plaintiff’s Exhibit No. 24 in evidence.

Mr. Paul Smith: Same objection.

The Court: Overruled. In evidence.

Q. Mr. Creel, you testified as to having exam-

(Testimony of Donald I. Creel.)

ined these various sales slips as to these various commodities; were they all the sales slips you were able to find between March, 1942, as to those commodities? A. Yes.

Q. Did you inquire of Mrs. Elertson as to whether or not she had given you all their March, 1942, sales slips to examine? A. Yes.

Q. What did she say?

A. She said that was all the slips.

Mr. Wohl: If the Court please, we haven't read these various exhibits in evidence——

The Court: Oh, they will be considered as read. I will have to read them sometime.

Mr. Wohl: I believe that is all. [181]

Cross-Examination

By Mr. David Smith:

Q. Mr. Creel, if you testified you made this examination for the Price Administration during the month of February, 1943, was that the time it was made?

A. No, sir. It was during the month of March; 23rd of March to the 31st, I believe.

Q. 1943? A. Yes, sir.

Q. And you examined the slips for the various sales that Sanden and Ferguson Company had for the month of March, 1942, and compared those sales as to prices and as to particular kind of goods listed, such as percale, burlap, whatever it would be, with the sales of 1943? You compared 1942 slips with 1943? A. Yes, sir.

(Testimony of Donald I. Creel.)

Q. Then you compared those prices with his basic list which he filed with the Board?

A. Yes, sir.

Q. When was the basic list of Sanden and Ferguson Company filed?

Mr. Wohl: That is objected to. There is no requirement the base period statement be filed with anyone.

The Court: Well, it may have been done whether it was required or not. Was it filed with the Office of Price Administration? A. No.

Q. But Sanden and Ferguson Company, however, did prepare a statement, did they not, during 1943 for the price list statement to which you are referring? A. Yes, sir.

Q. And this is the price list to which you did refer at the time when you made your investigation? That is true, is it not? [182]

A. I referred to the one that was on file, and also the one Mr. Sanden had in the store.

Q. You stated there wasn't any filed?

A. There is a statement filed; not the base period statement.

Q. That statement filed is the same statement to which you referred to as being the list prepared by the Sanden and Ferguson Company during 1943, was it not? A. Yes, sir.

Q. Were you acquainted with Mr. Sanden at the time this investigation was made? You met him, did you not?

A. I met him at that time, yes.

(Testimony of Donald I. Creel.)

Q. Did you have any conversation with him and/or any of the representatives or agents of the Sanden and Ferguson Company at the time they were preparing that statement as to what should be placed in there? A. I did not, no, sir.

Q. Do you know whether or not any officials of the Price Administration had a conversation with him? A. I do not know myself.

Q. In other words, you are not acquainted with the circumstances surrounding that period of time that Sanden and Ferguson Company made their statement? A. Not before March, 1943.

Q. This statement that was prepared by the Sanden and Ferguson Company was prepared after the time you made the investigation, was it not?

A. No, sir; it was prepared when I came there.

Q. You mean the statement that the Sanden and Ferguson Company furnished as its price statement?

A. Yes, sir. That was on hand when I came there March 23rd. [183]

Q. When you made the investigation?

A. Yes, sir.

Q. Do you have the original statement that was filed?

Mr. Wohl: That's a certified copy; it is exactly the same.

Q. In other words, then, to clear the matter up, the investigation was made after that statement was filed, prepared and filed by Sanden and Ferguson Company? A. Yes, sir.

(Testimony of Donald I. Creel.)

Q. Referring to those various exhibits which have been introduced in evidence here as being also the slips of Sanden and Ferguson Company, covering the period of 1942 and 1943, there is no relation, is there, between the slips of 1942 and 1943 with relation to the goods listed except that it was a particular kind of goods listed at a certain price? Isn't that true?

A. That is all it shows on the slip, yes, sir.

Q. Now take any one of these various kinds of goods, say, for instance, rayon, percale; any of those particular kinds of goods, they have different prices, do they not? Different lots have different prices?

A. I presume they do, yes, sir.

Q. Do you know the difference in raise between the prices of these various lots?

A. No, sir.

Q. You couldn't tell from those statements that were introduced into evidence as to what particular lots they referred to, could you?

A. No, sir.

Q. You couldn't determine from those statements as to the width or class of goods? [184]

A. No.

Q. And you are also aware of the fact that various kinds of goods have different classes, different weights, different sizes, and so forth?

A. I understood that, yes, sir.

Q. During the time that you were making your examination, taking, for instance the slips that you examined in 1942, also the sales in the month of March, do you recall or do you know how many slips you examined at that time?

(Testimony of Donald I. Creel.)

A. I didn't count them. I estimated there were probably 1500.

Q. Probably 1500. Did you examine very thoroughly at the time when you made your examination to be sure that there were no slips in there that you didn't pull out as being of any particular interest to you during the examination?

A. No, I didn't. I didn't; Miss Clark sorted those out and gave them to me. I didn't count those.

Q. And after this examination of the 1500 slips, the ones you introduced in evidence, so far as you know, are the only ones that were found of any particular interest to the Price Administration?

A. Yes, sir.

Q. After you made your investigation as of March, 1943, did you make any further investigation? Your investigation was made all at one time, was it not?

A. I think I went back to the store once in May; I believe May 15th. Outside of that I recall no other time.

Q. At the time you made your investigation did you find at that time that Sanden and Ferguson Company was out of a lot of goods at that time that they had and did have and sold in 1942? [185]

A. Well, I didn't go into that. That may have been true, but I don't know.

Q. Did you look for any particular kind of goods that were sold as shown by the slips in 1942 that

(Testimony of Donald I. Creel.)

did not show up in 1943 at the time you made your investigation?

A. I don't recall that we did. That could have happened, but that has been some time ago. I don't remember.

Q. The price range is dependent upon the class and character of the goods?

A. I presume that is correct.

Q. Do you know whether or not Sanden and Ferguson Company was carrying the same goods in 1942 and the same class of goods as they were carrying in 1943 at the time you made this investigation?

A. I don't recall off-hand; I might be able to by referring to notes as to purchase invoices. I made no particular note of that at that time.

Q. How long did it take you to make your investigation?

A. As I recall it, it was from March 23rd to March 31st.

Redirect Examination

By Mr. Wohl:

Q. Mr. Creel, Mr. Smith asked you whether it was only these sales slips you examined that were of any particular interest to the Office of Price Administration. You answered, I believe, "Yes." Did you attempt to make a survey or examination of all the commodities sold by Sanden and Ferguson Company?

A. No, I didn't.

Q. In other words, if any other articles may

(Testimony of Donald I. Creel.)

have been out of line, you didn't attempt to discern or disclose that fact? A. No.

Q. You were only concerned with the commodities you testified [186] to here? A. Yes.

EUGENE SANDEN,

having been previously sworn and having previously testified as a witness on behalf of the Plaintiff, was recalled by the Plaintiff and testified as follows:

Direct Examination

By Mr. Wohl:

Q. You are the same Eugene Sanden who has heretofore testified in this case? A. I am.

Q. Mr. Sanden, I believe that I asked you to produce at the trial an invoice from Butler Brothers No. 1-21-2035. Mr. Sanden, on February 9, 1943, you received a shipment of gingham, spun rayon, and gabardine yard goods from Butler Brothers, is that correct?

A. In the answers you called for I stated the date I received them. I couldn't tell you off-hand unless I saw the invoice, the date we received them.

Q. Mr. Sanden, I hand you Plaintiff's Exhibit No. 25 for identification and ask you what that is?

(Testimony of Eugene Sanden.)

PLAINTIFF'S EXHIBIT No. 25

National Distributors of General Merchandise
(Emblem)

BUTLER BROTHERS

Chicago - St. Louis - Baltimore - New York - Minneapolis

Dallas - San Francisco

First Ave., North & Sixth St., Minneapolis, Minnesota

34 [In pencil]: April 1st B

Date: 2/2/43 Order No. 1 21 2035 Amount 194 27

Folio B 92 C 204 Terms: 2% April 10 Net May 10

Bills after 25th of month as of first of following month. Interest charged on past due accounts. In correspondence relating to this invoice, mention order number and date of Invoice.

Sanden & Ferguson Co.

Helena

Montana

Please mail this top stub with your remittance

Date	2/2/43	Route	NP 2 PC	Butler Brothers
12 4425	150 yds	Swanee Suede		48½ 72 75
		16 18 19 18 18 15 15		
		16 15		
12 4435	33 yds	Bemberg	18 15	66 21 78
			18	
	4175	63 yds	Spun Rayon 15 15 15	49¼ 31 03
12 7350	yds	Broadcloths		Partial Shipment
12 7318	91 yds	Ginghams	29 31 31	247/8 22 41
12 4165	15 yds	Gaberdine		401/8 6 02
12 3319	30 yds	Broadcloths		173/8 5 21
12 3325 S	28¾ yds	"		291½ 8 95—47*
	3324			
	3255	41½ yds	Cloths	261½ 11 00

(Testimony of Eugene Sanden.)

12 3085	411½ yds	Seersucker	367 ⁷ / ₈	15 12 + .20
12 4425/211	yds	Swanee Suede	Partial Shipment	

194 27

Overcharge .27*

\$194.00

Nov. 28 av.= 1.00

193.00

[Circled in pencil]: 3.85

189.15

~~28600~~ Paid 2/10/43 S

[Stamped]: Feb 4 - 1943 OK ES 2/9/43

[Stamped]: The net selling price of merchandise governed by Maximum Price Regulation No. 127 does not exceed the maximum price permitted thereunder.

Some problems of pricing are still subject to clarification. The seller, in good faith, has used its best judgment in pricing merchandise on this invoice, however, it reserves the right in the event it is determined that any such merchandise is not priced in compliance with applicable governmental regulations, to adjust any or all of these prices accordingly.

XX Temporarily Out—Please	K Not Stocked at this Location
Reorder	F To be Shipped from Factory
XX Discontinued	D Description Inadequate,
M Less Than Minimum	Please Reorder
Packing	NA Not Available
S Substitute	

When we or our factories deliver goods to transportation companies in good order our responsibility ceases, and any claims for loss or damage should be taken up directly with the transportation companies. Claims of any other nature must be made within 5 days after receipt of goods.

* Indicates figures in red.

[Endorsed]: Filed Jan. 15, 1944.

(Testimony of Eugene Sanden.)

A. This is an invoice from Butler Brothers, billing us with various kinds of piece goods, including swanee suede, bemberg, spun rayon, broadclothes, seersucker, and there is something else I can't make out.

Q. By piece goods would that include yard goods?

A. Yes, we understand that in the trade to be the same thing.

Q. Now, I hand you plaintiff's Exhibit No. 26 for identification and ask you what that is?

PLAINTIFF'S EXHIBIT No. 26

Telephone: Pennsylvania 6-1366

Invoice No. 19957

YALE FABRICS CORP.

CK 13-62

F

501 Seventh Avenue
New York

Sold to:

Sanden & Ferguson Co.
Helena, Montana

[In pencil]: May 12th B

Order # 10415 Dept B

Date: 3/12/43 Terms F.O.B. Shipping Point: 2% 10 60 Days
Shipped at Your Risk Via: Ry Exp Salesman: Silberman

[Circled in pencil]: This account has been assigned and is payable only to United Factors Corporation, Factors, 1412 Broadway, New York City,

who are to be notified at once of any objections to this bill. Payment must be made direct to United Factors Corporation in New York City bankable funds at par.

Prompt examination is necessary, as No Claims will be accepted after five days from receipt, or after goods are cut.

(Testimony of Eugene Sanden.)

Jersey 5	Pat	1173	10 00	20
	6A	1031	364 54	20
	9	1109	357 79	18 $\frac{5}{8}$
	3	1193	387 64	19
	2	1110	399 32	20
	4	1110	367 66	20
	3	1139	417 36	18

135 $\frac{5}{8}$ 1.02 $\frac{1}{2}$

139.02 \$139.02

[Circled in pencil]: 2% = 3.77

135.25

Paid 3/22/43 S

DP 15.00 [In pencil]: OK ES 3/19/43 378

7 Pes [Stamped]: Mar 22 1943

[In pencil]: "Rayon Jersey" 54e29

[Endorsed]: Filed Jan. 15, 1944.

A. Yale Fabrics Corporation. This is a shipment of jersey, rayon jersey I believe it was, we received from them.

Q. Now can you tell from Exhibit No. 25 the lot number of the [187] gingham and yard goods appearing thereon?

A. Yes, it is stated here the lot number is 7318, 12 is the house department number.

Q. And with the gaberdine yard goods, what would the lot number of that be?

A. That is 4165.

Q. With the spun rayon yard goods?

A. 4175.

(Testimony of Eugene Sanden.)

Q. Now with regard to Plaintiff's Exhibit No. 26 for identification, what would be the lot number of the jersey you purchased?

A. There is no lot number.

Q. Isn't there any?

A. There is only the pattern number, and every piece or every cut of these cuts come off of a piece of jersey maybe 100 yards long; they cut off 20 yards and send it to us. They have itemized each piece by the pattern number, but these pieces happen to be of the same quality and the only way you can tell the quality is by the price.

Q. The quality would be identified also by this pattern number?

A. Not necessarily. The pattern number might be on several different qualities. In other words they might use the same design on two or three different qualities of rayon jersey and still it would be a different article entirely. And all of these houses, by the way, are not manufacturers; they are jobbers. That is those two are, piece goods jobbers. They buy that cloth from the mills and their sales agents.

Q. In other words on your base period statement and cost of living commodity where you have manufacturer you don't always [188] mean manufacturer?

A. No. It isn't required that you tell the manufacturer; that would be impossible. Even the jobbers don't know often times. They get them from printers, bleachers.

(Testimony of Eugene Sanden.)

Mr. Wohl: At this time we would like to offer in evidence Plaintiff's Exhibit No. 27 for identification, which is Answers to Certain Interrogatories submitted by the Plaintiff to the Defendant in accordance with the provisions of Rule 33 of the Federal Rules of Civil Procedure. The answers also include the questions.

Mr. Paul Smith: Objected to on the ground it is not the best evidence. The witness is here on the stand and testifying.

Mr. Wohl: We will withdraw the exhibit if they have no objection to our questioning the witness.

The Court: The purpose of interrogatories is to shorten the trial; get admissions of fact material to the issues. However, if you want to proceed by examination——

Mr. Wohl: I will renew my offer and submit the offer again of Plaintiff's Exhibit No. 27 in evidence.

Mr. Paul Smith: No objection.

The Court: Well, it is on the record.

Mr. Wohl: It isn't filed.

The Court: In that case it isn't on the record and the Court can't take judicial notice of it. You will have to have it marked.

Q. Mr. Sanden, I hand you Plaintiff's Exhibit No. 27 for identification and ask you what that is?

(Testimony of Eugene Sanden.)

PLAINTIFF'S EXHIBIT No. 27

In the District Court of the United States
for the District of Montana

No. 173

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

SANDEN AND FERGUSON COMPANY, a
Montana corporation,

Defendant.

ANSWERS AND INTERROGATORIES
UNDER RULE No. 33 OF THE FEDERAL
RULES OF CIVIL PROCEDURE

Comes now Eugene S. Sanden, having been first duly sworn, according to law, to testify on behalf of the defendant and makes the following answers to the interrogatories requested by the plaintiff under Rule No. 33 of the Federal Rules of Civil Procedure for the District Courts of the United States, as follows:

Question 5: What was the highest price at which each of said yard goods listed in Interrogatory No. 4 sold for, or in the event no sales were made, the highest offering price, during the month of March, 1942?

Answer 5: Do not know.

(Testimony of Eugene Sanden.)

Question 8: Did Sanden and Ferguson Company receive a shipment from Butler Brothers about February 2, 1943, of each of the following yard goods and if so what was the lot number of each, what material or materials were the same made of and when was each first offered for sale:

- (1) Gingham?
- (2) Spun Rayon?
- (3) Gabardine?

Answer 8: We received a shipment February 9, 1943 containing gingham, spun rayon and gabardine.

Question 9: Did Sanden and Ferguson Company receive a shipment of jersey, a yard goods, from Yale Fabrics Corporation about March 12, 1943, and if so what was the lot number of the same, what material or materials was it made of, and when was it first offered for sale?

Answer 9: We received a shipment from Yale Fabrics Corporation March 19, 1943, containing 135 $\frac{5}{8}$ yards of jersey. The jersey was made of rayon. Do not know when it was first offered for sale.

Question 10: Did Sanden and Ferguson Company receive a shipment of "Sunspun" chenille bedspreads, Lot No. 196, on or about January 7, 1943, and if so what kind of material or materials were the same made of and when were they first offered for sale?

Answer 10: We received a shipment February 3, 1943 containing eight chenille bedspreads No.

(Testimony of Eugene Sanden.)

196. They were made of cotton muslin foundation, with cotton chenille tufting. Do not know when they were first offered for sale.

Question 11: During the months of December, 1942, and January, 1943, or either of said months, did Sanden and Ferguson Company offer for sale any of the following yard goods and if so what material or materials were each made of:

- (1) Spun rayon?
- (2) Jersey?
- (3) Canvas?

Answer 11: We did.

Question 13: Was it the business practice of Sanden and Ferguson Company on March 1, 1942, and continuously thereafter to date hereof to issue a sales slip as evidencing each sale of a commodity and if so does Sanden and Ferguson Company retain a copy or the original of each such sales slip?

Answer 13: Yes. We have original sales slips of cash transactions for one year, and of credit transactions for five years.

Question 14: Was Lydia G. Clarke ever employed by Sanden and Ferguson Company and if so over what course of time and in what capacity?

Answer 14: Lydia G. Clarke has been employed as a saleswoman since April, 1920.

Question 15: Was Inga Ellertson ever employed by Sanden and Ferguson Company and if so over what period of time and in what capacity?

Answer 15: Inga Ellertson has been employed by Sanden and Ferguson Company since December 1911. She is in charge of credits and office work.

(Testimony of Eugene Sanden.)

Question 16: Who is the General Manager of Sanden and Ferguson Company and how long has he been such manager?

Answer 16: Eugene S. Sanden is the acting manager, and has been for 15 years.

EUGENE S. SANDEN.

Subscribed and sworn to before me this 12th day of January, A. D., 1944.

[Seal] PAUL W. SMITH

Notary Public for the State of Montana Residing at Helena, Montana.

My Commission Expires June 24, 1946.

[Endorsed]: Filed Jan. 15, 1944.

A. There are answers to questions submitted to me,—well, for the various purposes. Just simply a list of answers to different interrogatories. [189]

Q. Submitted by the Plaintiff in this action?

A. Yes, submitted by the Plaintiff in this action.

Q. Which you answered?

A. I have answered them, yes.

Mr. Wohl: We offer in evidence Plaintiff's Exhibit No. 27.

Mr. Paul Smith: No objection.

The Court: In evidence without objection.

Mr. Wohl: We offer in evidence at this time Plaintiff's Exhibit No. 25 for identification, and Plaintiff's Exhibit No. 26 for identification.

Mr. Paul Smith: Objected to on the grounds

(Testimony of Eugene Sanden.)

they are incompetent, irrelevant, and immaterial; they have no bearing upon the *issued* involved in this case.

The Court: What is the purpose?

Mr. Wohl: The purpose is to show they received a shipment of jersey in February, 1943, and also they received a shipment of gaberdine, rayons, and spun rayons.

The Court: In other words, in support of your contention that they had supplies from which they could make the sales they made?

Mr. Wohl: No, our contention is they received new articles and did not list them on the supplement to their cost of living commodity.

The Court: I think it is material for that purpose. Exhibit No. 25 will be received in evidence; overruled. Same with reference to Exhibit No. 26.

(At this point the Court took a short recess, after which the following proceedings were had:)

LYDIA G. CLARK,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows: [190]

Direct Examination

By Mr. Wohl:

Q. What is your name?

A. Lydia G. Clark.

Q. Mrs. Clark, by whom are you employed?

A. Sanden and Ferguson Company.

(Testimony of Lydia Clark.)

Q. How long have you been employed by that company? A. Twenty-three years.

Q. In what department of the store do you work?

A. I work in Department "B", or the dry goods, consisting of dry goods, and so on.

Q. Does that include yard goods? A. Yes.

Q. Did you assist in the preparation of a cost of living commodity statement for Sanden and Ferguson Company? A. I did assist.

Q. Did you assist in preparing a base period statement for that company?

A. Do you mean the listing of the items?

Q. Yes. A. I did.

Q. Could you tell us just what prices were used in making those statements?

A. What prices you mean?

Q. Yes.

A. The prices that were on the bolts.

Q. At what time were the statements prepared?

A. You mean the date?

Q. Yes; approximately the time.

A. Just a few days when Florence MacPherson took them.

Q. When was that? [191]

A. I couldn't just say.

Q. Do you know the month?

A. I don't believe I even paid any attention.

Q. Was it in January, 1943?

A. I wouldn't say; I couldn't say.

Q. I hand you Plaintiff's Exhibit No. 1 and direct your attention to the front page thereof on

(Testimony of Lydia Clark.)

which appears the words "To February 1, 1943", and ask, after having seen that, it refreshes your recollection as to when the statement was prepared?

A. It was prepared almost a year before that; just the date I couldn't give you.

Q. You mean in 1942, or 1943?

A. I couldn't tell you when it was prepared.

Q. In preparing these statements were the prices taken from the various commodities as they were offered for sale at the time the statements were prepared?

A. Yes.

Q. Do you know if there was any change in the prices of yard goods in the month of March, 1942, to the month of January, 1943, in selling price?

A. No, I wouldn't say there was; there wasn't.

Q. Mrs. Clark, I direct your attention to Plaintiff's Exhibit No. 24, which has been testified herein as sales slips issued by Sanden and Ferguson Company. I direct your attention to the words on there, "5 yd sateen," the figure "59", and the other figure "2 95", and ask you if you know what that represents?

A. That represents black sateen.

Q. Is that a yard goods?

A. Yes. [192]

Q. Now I direct your attention to Plaintiff's Exhibit No. 22 and ask you if you will tell me what that sales slip represents?

A. That is burlap.

Q. Is that a yard goods?

A. Yes.

Q. Will you look at the sales slip underneath that, the same exhibit? Does that represent a sale of yard goods?

A. Yes.

Q. I direct your attention to Plaintiff's Exhibit

(Testimony of Lydia Clark.)

No. 21, consisting of several slips, and ask you to go through each slip and tell me whether you know what each slip indicates a sale of?

Mr. Paul Smith: Objected to on the ground these slips are not being identified to Mrs. Clark.

The Court: They apparently have all been admitted in evidence. If she doesn't know what they indicate, why of course that is a matter of importance. A. They are tickings.

The Court: On the record as it stands now it appears she is the head of this particular department. She ought to know what they are.

Mr. Paul Smith: Unless she made them out she wouldn't know.

The Court: Whether she made them out or not, she is the head of the department and is supposed to know.

Mr. Paul Smith: Objected to on the ground it is not properly identified any way.

The Court: Overruled; these matters are all in evidence.

Q. Yes, these are exhibits that are in evidence. What do you mean by ticking? Is that a yard goods? A. That is a yard goods. [193]

Q. I direct your attention to Plaintiff's Exhibit No. 20, which purport to be sales slips issued by Sanden and Ferguson Company, and I ask you to examine each one of the sales slips making up that exhibit and tell us what those sales slips evidence as to percale only? A. Percale.

Q. Is that a yard goods? A. Yes.

(Testimony of Lydia Clark.)

Q. I direct your attention to Plaintiff's Exhibit No. 19 and ask you to check through each one of those slips with regard to the word percale written thereon and tell us what those slips indicate the sale of? A. Percale.

Q. A yard goods? A. Yes.

Q. I direct your attention to Plaintiff's Exhibit No. 18, and particularly to the lettering there, "I", followed by the word "Head", and ask you what that means? A. Indian head.

Q. Is that a yard goods? A. Yes.

Q. Would you say the same is true of Plaintiff's Exhibit No. 17, the word "I" "Head"?

A. Yes, Indian Head.

Q. A yard goods? A. Yes, sir.

Q. I direct your attention to Plaintiff's Exhibit No. 15, with reference to the word jersey, and ask you to check through each one of the slips comprising that exhibit and tell us what is represents the sale of? [194]

A. Printed and plain jersey.

Q. A yard goods? A. Yes.

Q. I direct your attention to Plaintiff's Exhibit No. 16, particularly with regard to the word jersey, and ask you to examine each of those sales slips and tell us what they evidence?

The Court: I notice that on that exhibit there are some figures on the outside.

A. That's our figuring; it is just where we measure and figure out the price.

(Testimony of Lydia Clark.)

The Court: Does that apply to the figures on the back of each of these slips?

A. Not always, just depends how we figure it out on the back sometimes. I would say some of these are plain and printed jersey.

Q. A yard goods? A. Yes.

Q. I direct your attention to Plaintiff's Exhibit No. 5 and ask you to check through each one of those sales slips and tell us what they evidence the sale of?

A. Those are different qualities of gingham.

Q. A yard goods? A. Yes, sir.

Q. I direct your attention to Plaintiff's Exhibit No. 7, particularly to the word denim, and I ask you to check through those sales slips and tell us what they represent the sale of?

A. Well, that could be dress denim or overall denim.

Q. That's a yard goods? A. Yes. [195]

Q. I direct your attention to Plaintiff's Exhibit No. 6 with reference to the word "gin." What is that? A. That's gingham.

Q. I will ask you to check through each one of the sales slips making up that exhibit and tell us what they represent only with regard to gingham?

A. Well, would be different qualities of gingham, which is a yard goods.

Q. I direct your attention to Plaintiff's Exhibit No. 14, particularly with reference to the word gaberdine, and ask you to check through each one

(Testimony of Lydia Clark.)

of those sales slips and tell us what sales they evidence?

A. Different qualities of gaberdine.

Q. Is that a yard goods? A. Yes, sir.

Q. I direct your attention to Plaintiff's Exhibit No. 13, particularly with reference to the word gaberdine appearing thereon, and ask you to check through each one of those sales slips and tell us what those sales slips evidence?

A. Some cotton gaberdine and some rayon gaberdine.

Q. Those are yard goods? A. Yes.

Q. Directing your attention to Plaintiff's Exhibit No. 12, "1/3 Eyelet 79 27," what does that evidence?

A. It is eyelet embroidery used for blouses.

Q. A yard goods?

A. It is a yard goods, yes.

Q. Do you recall what that eyelet was made of, what kind of material?

A. Just eyelet embroidery, white batiste with embroidered eyelet in it. [196]

Q. Is it cotton? A. It is cotton.

Q. Directing your attention to Plaintiff's Exhibit No. 11, particularly with reference to the word "spun Rayon". Will you check through those sales slips and tell us what they evidence?

A. It may be printed rayon. It could be plain or printed rayon, which is a yard goods.

Q. Directing your attention to Plaintiff's Exhibit No. 10, particularly with reference to the

(Testimony of Lydia Clark.)

word "spun Rayon". Will you check through and tell us what that evidences?

A. Different qualities of rayon, a yard goods.

Q. I direct your attention to Plaintiff's Exhibit No. 9, to the words "9 yd Challie 2 25." What does that mean?

A. Challis is a comfort covering, cotton material.

Q. A yard goods? A. Yes.

Q. I ask you to examine Plaintiff's Exhibit No. 8 with reference to the word denim. Examine each of those sales slips making up that exhibit.

A. Different qualities of denim, which is used for overalls or children's garments.

Q. Would that be a yard goods?

A. That would be a yard goods.

Q. Now I direct your attention to Plaintiff's Exhibit No. 1, page 4 thereof, to the word "Gingham," "Golden Rod," "Carsons," 39c, and I'll ask you if you know what refers to? Would that be yard goods?

A. Oh, yes; that's a yard goods.

Q. Now I direct your attention to page 9 of the same exhibit [197] to the word "Chali," lot number 5904, "CPS." maximum price 32c and ask you if that is a yard goods? A. Yes, it is.

Q. I direct your attention to the word "Ticking" on page 9 of Exhibit No. 1, lot number 4388, "Mitchell F" manufacturer, description, colored, maximum price 65c, and ask you if that represents a yard goods? A. Yes, sir.

(Testimony of Lydia Clark.)

Q. I direct your attention to two items of denim on page 9, Exhibit No. 1, one being described as lot 5028, and the other as "overall", and having maximum prices of 45c and 35c, respectively, and ask you if they represent yard goods?

A. Yes, they do.

Q. I direct your attention further on the same page 9 of Exhibit No. 1 to the word "Burlap", plain, maximum price 45c, and ask you if that is a yard goods? A. Yes, sir.

Q. Further on the same page 9 I direct your attention to three items of ticking, one "Amoskeig," one having lot number 4504, and one being described as a short length, and ask you if those three items represent yard goods? A. Yes.

Q. I direct your attention to page 3 of Exhibit No. 1, to the word "Eyelette", manufacturer "Robinsons", description, white, maximum price \$1, and ask you if that represents a yard goods?

A. It does.

Q. I direct your attention further on the same page 3 to two items of gaberdine appearing thereof manufactured by Belding, description, plain, one having a maximum price of \$1.19, and one having a maximum price of 89c, and ask you if they represent [198] yard goods? A. They do.

Q. I direct your attention to page 4 of Exhibit No. 1, to the word "Plain Perc", "Golden Star", manufacturer "Rice-Stix," description 80 sq., maximum price 35c a yard, and ask you if that is a yard goods? A. It is.

(Testimony of Lydia Clark.)

Q. I direct your attention further on page 4 to two items of "Indian H.", manufactured by Butler Brothers, one being described as white with the number 44 immediately after it; the second is white with the number 54 immediately after it; one having the maximum price of 49c, one with the maximum price of 59c, and ask you if those two items refer to Indian head, a yard goods?

A. They do.

Q. I direct your attention to page 4 of Exhibit No. 1, to the word "Sateen", manufacturer Robinsons, description, colors, maximum price 45c, and ask you if that represents a yard goods?

A. Yes, sir.

Q. Now, Mrs. Clark, on about February 9th Sanden and Ferguson Company received a shipment of ginghams, spun rayon, and gaberdine from Butler Brothers. Do you know when those articles were offered for sale in the store?

A. If they were offered for sale?

Q. Yes. Do you recall the shipment came in?

A. I couldn't recall just exactly a certain shipment, but we have them brought up and checked and then we put them on the shelf, but just a certain one——

Q. I direct your attention to Plaintiff's Exhibit No. 25, which is a purchase invoice, showing the purchase of lot 4175 [199] of spun rayon, a yard goods; lot 7318, gingham, a yard goods; and lot 4165, gaberdine, a yard goods. This copy is dated February 2, 1943. Do you know whether those

(Testimony of Lydia Clark.)

commodities were placed on sale at the Sanden and Ferguson Company? A. Yes.

Q. Do you know approximately the time?

A. Just the date they were checked in they were brought up.

Q. And placed for sale? A. Yes.

Q. Now, then, about March 19, 1943, Sanden and Ferguson Company received a shipment of jersey, a yard goods, from the Yale Fabrics Corporation. Do you recall that shipment?

A. Yes.

Q. Do you know when it was offered for sale?

A. Well, right after it was checked it was offered for sale.

Q. About how soon? Within a few days?

A. Within a few days, yes.

Q. Do you recall whether during the month of March you were selling canvas, a yard goods, at 35c per yard?

A. Month of March? What year?

Q. 1943.

A. 1943? I don't definitely remember selling it just at that time, but then I probably did.

Q. Do you remember having it on the shelves for sale?

A. We have now; we had then.

Q. Do you recall what the canvas was made of?

A. Cotton goods.

Cross-Examination

By Mr. David Smith:

Q. Mrs. Clark, referring to these slips that

(Testimony of Lydia Clark.)

were handed to you marked as Exhibits 8, 9, 10, and so forth as Mr. Wohl just [200] referred to them, were all of these items sold by you?

A. No.

Q. Does each sales lady have a particular number? A. Yes.

Q. Do you always use the same number?

A. Not definitely; sometimes if it is the other party's sale we put it on their book.

Q. Could you tell by looking at each of these statements exactly who made the sale?

A. Well, not definitely, no. Probably could——

Q. For instance here you have denims, these sales, for example, Exhibit No. 8, and ask you if you can tell me who made those various sales there? A. Mrs. Mills and I.

Q. Can you tell by the writing? A. Yes.

Q. Now referring also to these Exhibits No. 8, which apparently were introduced in evidence as sales as of February, 1943, referring in each case to denim, is this the same identical class and kind of goods of denim that was sold by Sanden and Ferguson Company in March of 1942?

A. Not necessarily, no.

Q. Are there different kinds and classes and qualities of denim? A. Yes, sir.

Q. How much of a range is there in this class of goods, in this kind of goods—denim?

A. Well I would say if you took all of them in you might go to ten, fifteen ranges; different qualities and different uses for them. [201]

Q. Can you tell by the examination of these

(Testimony of Lydia Clark.)

slips as to what kind and quality was indicated by the slips? A. I couldn't, no.

Q. Did you have in February, 1943, different kinds and classes and qualities of denim?

A. We did.

Q. What is denim?

A. Well, denim is a weave that would be—well, like overall denim, or children's garments made from denim. And there is a denim you would use for—khaki denim—that is used for men's trousers, different things of that type.

Q. This is all listed in the price list of Sanden and Ferguson Company with the Price Administration as denim? A. Yes.

Q. At the time when you listed those various kinds of denim, did you list every kind of denim that you had on your shelves at that time?

A. Yes, we did.

Q. And in 1942 would there be any change particularly in class, range of price, and quality between 1942 and 1943 that you would recall particularly?

A. Well, we may have gotten some of the other types of denim in and put them on the shelves, but that wouldn't say they were the denim we listed.

Q. Do you know whether or not there was any raise in price in any particular kind of denim that was sold in March, 1942, and sold in March, 1943, and was the same class? A. No.

Q. Were you instructed at any time by Sanden

(Testimony of Lydia Clark.)

and Ferguson Company to raise prices on any of these staple goods articles? [202] A. No.

Q. Do you recall of you yourself or anyone working under you in this department so changing prices or raising, or lowering prices of staple articles between that time? A. No.

Q. Referring also to other items as listed in here like spun rayon, are there different classes and qualities of spun rayon? A. There are.

Q. Would they all be the same width?

A. They would run all 39.

Q. But there are different classes?

A. Yes, printed and plain and different qualities.

Q. Do you know whether or not later on you discovered any small amounts, ends of bolts, or anything of that kind, that were not listed on the price list?

A. There were several small lengths and odds and ends that we never listed at all.

Q. Why didn't you list them?

A. Well, we usually take them and put them in the remnants or sell them for less money. They weren't of any value definitely.

Q. Could there have been any bolts of yard goods in the possession of Sanden and Ferguson Company of a higher quality that weren't listed that might have been sold for a higher price perhaps than some yard goods might have come in 1943? A. No.

Q. What is challis?

(Testimony of Lydia Clark.)

A. That's a cotton fabric, printed, for covering comforts.

Q. Do they come in different widths?

A. No; 36 inches. [203]

Q. Are they all in the same price range?

A. No; they could be a different weight.

Q. How much change would there be?

A. Well, you could get it from I would say 15c up.

Q. What governs the price you place on an article when it comes into the store?

A. Well, mostly the cost and the quality of the garment or yard goods; whatever it is.

Q. Crepe and gaberdine, are they of different classes? A. Yes.

Q. Different qualities? A. Yes.

Q. And with relation to all of these various kinds of goods, there would be different qualities which you would have in March, 1942, than you would have in February or March of 1943?

A. Yes.

Q. And vice versa? A. Yes.

Q. What system did you use at the time when you made out, or helped with the making out of the statements as to what class of goods were listed? Did you list goods as of 1942, or goods as of 1943?

A. You mean——

Q. When you listed them in this price list that Gene's sister Florence helped you with.

A. We took the prices right off the bolt on the shelf.

(Testimony of Lydia Clark.)

Q. In other words, the price listed at that time were articles on the shelf in 1943 when the listing was done? A. Yes.

Q. Are there different classes of gingham?

[204]

A. Well, I would say there would be fifteen or twenty qualities of gingham.

Q. Different classes and qualities. Each one would have a different price? A. Yes.

Q. Would they have different weights and different widths? A. Yes.

Q. What is jersey?

A. It is a knitted fabric.

Q. All the same width? A. No.

Q. Are there any different ranges as to price and quality? A. Yes.

Q. What would that range be?

A. Well, there would be plain jersey and there would be printed jersey, and different weights.

Q. What is the difference between printed jersey and plain white jersey?

A. Well, we have plain jersey at \$1.65, and printed jersey at \$1.69. And then we even have wool jersey that we listed; no, we didn't have it when we put in the lists.

Q. How soon thereafter did you get that?

A. Just how soon I couldn't say.

Q. Did you have any wool jersey that you know of in March, 1942? A. No, sir.

Q. Do you know whether you did or not?

A. No, sir.

(Testimony of Lydia Clark.)

Q. Can you tell by looking at these slips as to what quality and kind of jersey it was? [205]

A. I could by the price.

Q. You can tell by the price? A. Yes.

Q. That is the only way you could indicate it?

A. From the slips. If I saw the material I could tell.

Q. Indian head. Does Indian head come in the same width?

A. No, it comes in six different widths and colors?

Q. Same weight?

A. I wouldn't even say that if it is real indian head; there are other cloths could be Indian head.

Q. Different qualities? A. Yes.

Q. And each of these various widths and weights and qualities would govern the price, would it not? A. Yes, and then color.

Q. Did you have the same article in March, 1942, that you had in 1943 in Indian head?

The Court: We will hope they sold some between those dates.

Q. As a matter of fact, referring to, for instance, percale, and these tickings, burlap, sateen, are they all of the same class and kinds sold in 1943 as was sold in 1942?

A. Yes, they are; that is we might not have had it when we made that list out; when we got it it would be a better quality than when we listed.

Q. In other words, you had the same range of prices with regard to your goods?

A. Yes, sir.

(Testimony of Lydia Clark.)

Q. And the only way you can identify the quality and class of goods by the slips is by the price? A. Yes. [206]

Q. And the price might be different at different times in the store? A. Yes.

Q. And each one of these classes of goods have a different classification? They have a different price range, quality, weights, widths, and so forth?

A. Yes, sir.

Q. This Plaintiff's Exhibit No. 23 refers to overalls, does it not?

A. I am not in that department.

Q. You are in department "B"? A. Yes.

Q. This is in department "F"? A. Yes.

STEPHEN T. McDERMOTT

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wohl:

Q. State your name, please.

A. Stephen T. McDermott.

Q. By whom are you employed?

A. The Office of Price Administration.

Q. How long have you been so employed?

A. Since October 19, 1942.

Q. In what department are you employed?

A. I am in the price division.

Q. Are you acquainted with Eugene S. Sanden?

A. Yes, sir.

(Testimony of Stephen T. McDermott.)

Q. I will ask you whether or not during the month of January Eugene S. Sanden and his sister, Mrs. MacPherson, had a conference with you and Mr. Loren Anderson at the Office of Price [207] Administration in their office in the Placer Hotel, Helena, Montana? A. That is correct.

Q. Would you state briefly just what took place at that conference?

A. Mr. Sanden and his sister visited the office and they had a warning notice from the Office of Price Administration in Denver——

The Court: That is not important; you don't know that at all. Answer the question.

Q. Just tell what you know.

A. He questioned us regarding what records were necessary and for the various regulations and the outline of what should be done and we delivered to him a copy of retailer's bulletin No. 2, entitled "What Every Retailer Should know about the General Maximum Price Regulation." At that time we discussed fully what the record should consist of.

Q. Did Mr. Sanden or his sister inquire as to what should be included in the base period statement? A. Yes, they did.

Q. Did you inform them as to what should be included therein? A. Yes, we did.

The Court: What did you tell him?

A. We told him every item in his store must be included in his base period list, reflecting the prices of those items as of March, 1942.

(Testimony of Stephen T. McDermott.)

The Court: Does every article in every store fall within the cost of living commodity statement?

A. Not in the cost of living it doesn't; but the base period list——

The Court: In other words, your organization requires every [208] merchant dealing with goods in America, these United States, to give an absolutely complete list of everything in the store?

A. And the price on that item March, 1942. That is not required to be filed, but must be maintained in the establishment.

The Court: What is the approximate cost of such a thing?

A. It would depend entirely on the size of the store.

The Court: A store the size of Sanden and Ferguson's.

A. The help situation as it is, perhaps one year after it should it would cost more than if that item had been made——

The Court: Tell me what the approximate cost would be when it came in.

A. What is the wage rate?

The Court: I haven't any idea, but I am living in America; I like to know what burdens are being put upon the citizens; it has a bearing upon the Constitutional question, whether the Government has a right to say you must. If you can't tell us what the cost would be in a store of the kind Sanden and Ferguson's had, of course you can't.

A. I couldn't without going into further records.

(Testimony of Stephen T. McDermott.)

The Court: The Defendant is contending that it is taking of property without the due process of law. The cost of complying with these rules may have a bearing on the issues; that is why I am interested in it.

Q. I believe you testified you gave Mr. Sanden Bulletin No. 2? A. That is correct.

Q. I show you Plaintiff's Exhibit No. 4 and ask you if that is a copy of that bulletin?

A. It is a copy.

Q. Did Mr. Sanden ask as to how to prepare a cost of living commodity statement at that time?

[209]

A. He did.

Q. And what did you advise him?

A. We turned to the page in the book where it is outlined as to the procedure that should be followed in making up such lists, and then pointed out that these items he has must all be listed; the prices that these items were offered for sale during March, 1942 must also be shown there and not present prices unless the prices were exactly the same.

The Court: When was this talk?

A. This was in January, 1943.

The Court: How did you expect him to determine what the selling price was in March, 1942?

A. That would require detailed study of their invoices and sales tickets.

The Court: Which would be a matter of some doubt after detailed study?

A. Generally speaking it shouldn't be too dif-

(Testimony of Stephen T. McDermott.)

ficult where your lines of merchandise are pretty well stabilized.

The Court: Did you ever try to do it?

A. I have had to do it. I have been in the retail business——

The Court: Under O.P.A. direction?

A. Not under O.P.A. direction, I haven't. The retail business in which I had to prepare this list was prepared in from May and early June of 1942. The cost of producing it in our store, which was a store doing approximately a half a million dollar business, was the employee's time of one day, which would amount to about \$90.

The Court: That was in April and May following March? A. Yes, sir.

The Court: When the invoices were all on hand and apparently [210] in order?

A. And very much of the merchandise was on the shelf that was there during the month of March.

The Court: We are dealing with another situation, May and March and different years, and we are dealing with conditions in Helena; the labor shortage; probably not as accurate in bookkeeping as they are in other places, but we will pass it if you don't know what the cost would be to Sanden's, you just don't know. Proceed.

Q. You mentioned this conversation took place with Mr. Loren Anderson. Will you tell us who Mr. Anderson is?

A. Mr. Loren Anderson is State Price Executive of this District, which includes the State of Montana.

(Testimony of Stephen T. McDermott.)

Q. Was there a Mr. Wertz connected with the Office of Price Administration?

A. Mr. Wertz was Enforcement Attorney for the Office of Price Administration.

Q. Is he now employed by the Office of Price Administration? A. He is not.

Cross-Examination

By Mr. David Smith

Q. Did you require a merchant to change his method of doing business in any way for the filing of these statements?

A. Did we request him? No, we did not.

Q. As a matter of fact under the regulations is it not true that the merchant does not have to change his method of doing business for the purpose of satisfying the Government as to his price level?

A. Under the general maximum price regulation that is correct; they were not required to. Since that time there have been some regulations dealing with specific regulations that may change [211] some types of business so far as operation is concerned. More particularly I have in mind ready-to-wear.

Q. When did that change take place?

A. That change took place February 24, 1943, the date that maximum price regulation 330 went into effect.

Q. Was that included in the pamphlet you handed Mr. Sanden?

A. No, those regulations were sent to Sanden

(Testimony of Stephen T. McDermott.)

and Ferguson Company at the same time they were sent to all other merchants.

The Court: How do you know that?

A. We have a card index attached to each regulation and the card is returned to the office.

The Court: Produce that card index showing that here at ten o'clock tomorrow morning.

Q. Is it not true that businesses have different methods—

A. That is correct.

Q. —of keeping books?

A. That is correct.

Q. Some of them take regular inventory, and some of them do not? Isn't that a fact?

A. Every store that I have ever had any connection with has taken a periodical inventory, usually between Christmas and New Year's, in order that we might provide an adequate trading statement.

Q. You are speaking of merchants, businesses you have been connected with?

A. Yes, sir.

Q. But it is true there may be many other different methods of carrying on business?

A. That is correct.

Q. In other words, the cost of overhead in a man's business [212] has quite a bearing, does it not, as to the price his merchandise can be sold for?

A. Naturally all overheads are not the same, so all mark ups couldn't be the same.

Q. Some stores might have inventory every 90 days; some every 60 days; some only once a year?

A. Depending on the commodity sold I think.

Q. Some merchants might not have a base inventory at all?

(Testimony of Stephen T. McDermott.)

A. What do you mean by a base inventory?

Q. As to listing of prices.

A. You mean quantity?

Q. Yes, quantity, prices, and the various different kinds of articles.

A. Well, I suppose it might be possible. I don't see how they could make out their income tax without it.

Q. Income tax is based upon the amount of money made, is it not?

A. It generally could be different, yes.

Mr. David Smith: That is all.

The Court: Just what line of business have you been in and where?

A. I was in business in Glenwood Springs, Colorado, where I worked in a retail dry goods store.

The Court: A small town?

A. That was a town around 2500 people. I managed a general merchandise store in Wyoming.

The Court: How many people?

A. That was a town of 250 people; and I was assistant manager of J. C. Penney Company in Billings, Montana.

The Court: How long? [213]

A. I was assistant manager for four years, and I worked for them for three years prior to being made assistant manager.

The Court: How did you happen to leave a responsible position like that to come in here?

A. Because I thought I might be able to aid in this national crisis, I left their employ in July, 1942.

(Testimony of Stephen T. McDermott.)

The Court: Is that all the experience you have had in merchandising? A. Yes, sir.

The Court: Any further questions?

Mr. David Smith: That is all.

Mr. Wohl: That is all. The plaintiff rests.

The Court: Very well, I think we will adjourn at this time until ten o'clock tomorrow morning.

(Saturday, January 15, 1944, ten o'clock in the morning, trial of the case of Chester Bowles v. Sanden and Ferguson Company resumed and the following proceedings were had:)

The Court: Proceed with the case on trial.

Mr. Wohl: If the Court please, at the close of the testimony yesterday you instructed Mr. McDermott to produce the card index files of the Office of Price Administration into court this morning. He has it here.

The Court: Very well; I'll check the record during the noon hour and see what I want done with it.

DEFENDANT'S CASE

EUGENE SANDEN,

called as a witness on behalf of the Defendant, and having been previously sworn and having previously testified as a witness on behalf of the Plaintiff, testified as follows:

Direct Examination

By Mr. David Smith

Q. State your name, please. [214]

(Testimony of Eugene Sanden.)

A. Eugene Sanden.

Q. You are the manager of the Sanden and Ferguson Company, the Defendant in this action?

A. I act as manager, yes.

Q. How long have you been connected as manager of Sanden & Ferguson Company?

A. Oh, for approximately fifteen or twenty years.

Q. As such have you become acquainted with the merchandise handled by the store, the various classes of goods, prices, qualities, weights, and widths?

A. Yes.

Q. Are you in that capacity the buyer of goods?

A. Yes, I have.

Q. Explain to the Court your duties as of February and March, 1943, as well as the present time, in that store.

A. March, 1943, or March, 1942.

Q. Well, both if there is any difference.

A. March, 1943, and my duties at the present time are very similar. In 1942 I was manager; I had a sort of executive job where I handled the office work and took care of public contact, took care of the advertising, and did that sort of work. But in March, 1942, or shortly thereafter we lost one of our boys to defense work in California; and later in that year in September, one of my assistants, my principal man in the store, was called to the army and that left me without any help whatsoever in the men's department so that I went down and took care of that alone practically through September,

(Testimony of Eugene Sanden.)

October and November of 1942. In 1942 in December I secured the services of an elderly lady to help me in the men's section, and a girl who was married to an army man came in [215] and helped out through the Christmas selling season. So I was, you might say, in very tight straits concerning help and my work became more and more floor work and clothing work, and assisting in the janitor work. The old man we have for janitor is up in his late 70's; my father is past 80 years of age, and one of the clerks, head girl in the notion section, went to the WAC's, she became a WAC. The other girl who assisted her in the notion section took a job, an office job, which she preferred to selling. She took this office job with the telephone company. Our assistant dry goods lady went out to the coast where her husband was employed in war work. Our assistant office girl went and took a man's place over in one of the banks in town. And so we have been in a desperate situation so far as the help problem is concerned and I have had to get in and take care of the loose ends wherever possible.

Q. At the present time and also in March and February you were doing the buying, distributing of these goods?

A. I was doing the buying, I did the banking, I would take care of the mail, check in merchandise from both express and freight; I lugged it around; helped clean up the store,—I am a general utility man, as it were, instead of a manager.

Q. Mr. Sanden, on or about February 1, 1943,

(Testimony of Eugene Sanden.)

you prepared for the Price Administration a base period statement where you set forth the various goods that were in the store for sale?

A. Base period statement and cost of living commodity list of prices was prepared in January and early February, 1943.

Q. Now, Mr. Sanden, why did you prepare that statement, or cause it to be prepared?

A. Well, it was essential that we prepare it; we tried to do [216] the best we could about it. We went over, my sister and I, to see Mr. Anderson and Mr. McDermott, and it was our understanding at that time that it would be all right to prepare the list by taking the merchandise that was in the store at that time and listing it together with the merchandise that we had on hand and list that merchandise and that would be a satisfactory statement to be listed, a basic price list and cost of living commodity list.

Q. Do you know whether or not this list covered all the goods in the store?

A. Well, we endeavored to, of course. Instructions were to those who got the goods out and listed it to take and list everything, but you know human beings are fallible and they are bound to overlook items here and there, as I did it myself in connection with the overalls you are talking about in this case. I had something to do with the listing of those overalls and I overlooked a carpenter's overall, Black Bear heavy white duck overall, manufactured by the Black Bear Company in Seattle, and I think we had a few pairs on hand under the shelf some-

(Testimony of Eugene Sanden.)

where I overlooked in the rush. I made that mistake. I have the invoice right here now of the overalls; we sold them for \$3 a pair——

Mr. Wohl: We object to the witness' testifying it is not responsive to the question.

The Court: It is responsive. He was asked if he listed every item in the store. He said that he endeavored to, but he personally tried to list the overalls and overlooked one.

A. ——I overlooked this one item here, and the overall cost us \$33 a dozen in Seattle for the regular sizes, and \$36.30 a dozen in Seattle for the extra sizes, and we sold them here [217] in Helena for \$3 a pair. Now I don't think anybody has been injured there.

Q. You have been charged, Mr. Sanden, that you failed, neglected, and refused to list all the commodities sold or offered for sale in March, 1942, with the maximum prices thereof. Explain to the Court with relation thereto?

A. Well, of course that is merely an allegation. No, I deny that very definitely. The instructions were to those who took stock for the purpose of making the list to list everything, and it was our endeavor—we tried our best to list everything. But, as I say, in a store that handles thousands of items you are bound to overlook a few. As a matter of fact these few instances of failure to list it seems to me proves that our record is very good in view of the fact that we were investigated for approximately three weeks time. Our records were taken

(Testimony of Eugene Sanden.)

out of the store over to the Placer Hotel where they analyzed them and went through them and it was three weeks to the day from the time they came into the store to begin investigation—they went around to all sections; they didn't investigate these few retail dry goods items, they investigated everything through the store and they finally landed on these few things back in one corner of the store to make a case. But we handled so many different things——

The Court: How many items do you handle?

A. I should say we handle approximately 4,000 items.

The Court: And how many in March, 1942.

A. We handled more in March, 1942, than in March, 1943, because merchandise has been getting scarcer, and many things talked about here—for instance canvas, we haven't a yard of canvas in the store and can't get it. We haven't a yard of denim in the [218] store, and there are several other things we are entirely out of, can't replace, so in March, 1943, we had less goods on hand than we had in March, 1942.

The Court: Would that be just less in quantity or less in number?

A. Less in quantity and——

The Court: What I was trying to get at is this,—the idea is you are charged with having made a mistake in several respects. I wanted to know what the percentage of error was?

A. Well, I don't believe the percentage of error is one percent, or even one-half of one percent; I doubt it very much.

(Testimony of Eugene Sanden.)

Q. Mr. Sanden, do you maintain a permanent inventory system?

A. No, we do not. We have no permanent inventory system.

Q. Explain to the Court the system you keep in the store upon which you based this price listing and commodity listing so that the Court will understand what you had to work with and what you based the listing upon?

A. Well, in the listing we went to the goods themselves. Our inventory had already been taken. We take our inventory after Christmas and usually complete it shortly after the first of the following January, but in this case it was necessary for us to get lot numbers and secure the names of manufacturers and describe the article and show what the retail price was. Well our inventory system doesn't take any of that into consideration. All we do in taking inventory is to list categorically goods of prices and cost price. We have the cost system we work under one system of inventory, but we don't itemize each article according to lot number and description and manufacturer; it is an entirely different thing.

Q. How long have you maintained that system?

[219]

A. That has always been our system.

Q. Why do you maintain that particular kind of system rather than a permanent inventory system?

A. Well, because we are a small store relatively, in a small community and we try to operate simply

(Testimony of Eugene Sanden.)

because simple operation means less cost, and less cost means we are in a better competitive position. If we had a permanent inventory system it is very likely we couldn't continue in business because the cost of installation of the permanent inventory system for a single store would amount to approximately \$2000, and then it would take two people full time at approximately \$150 a month apiece to keep that permanent inventory going, and we have never operated on that basis for this reason, we are in constant contact with our employees. Now some organizations have no personal contact between management and their sales forces, or personnel below management, and are required to have a permanent system of inventory for police purposes; it is a police system. They have to keep track of every single item right down to the last nickel; they have to account for this and account for that. It isn't so in our store; never has been.

Q. You heard the witness testify for the Plaintiff with relation to the fact that it was an easy matter to keep a permanent inventory system, or in that neighborhood, and gave as an example that he had been employed by the J. C. Penney Company and that it was an easy matter to make a listing of this kind because of the inventory. Do you know anything about that?

The Court: I think in that matter we can assume the Judge has ordinary intelligence and experience and common sense requires that he shall conclude that a system proper for use [220] in a

(Testimony of Eugene Sanden.)

chain store such as Penney's is not at all applicable or reasonably expected to be used in a small store operated in a small town such as the Defendant operates in this case. That's the chief difficulty with the OPA; they are trying to conduct the business of the individual in the same way the chain store operates. Sears', Penney's, with hundreds of employees, it is a simple matter. As the witness suggested, they have to have the inventory system as a police measure. They don't know their help; they can't trust their help. A small store operates in constant contact with their employees; he knows them, he knows their habits, so we will just get away from that idea that the OPA can establish a system. He has testified he couldn't operate under that system. He would have to close his doors. The Government may be able to prove he is wrong in that contention, but clearly the Government has no right, or a bureaucratic agency, to take from a man his earnings of a life time, and that is the situation here. This man and his father before him have been in business for more than a half century right here. The net result of his testimony is that the business would be closed if he is required to do what these experts in Washington think he should do with such great ease. So, I think we will just take it for granted that the bureaucrat was without power to require him to adopt the method that it might be possible for large chain stores to use; they must temper the rules to the situation in which the individual finds himself. In other words, they must cut their system in such a way that the

(Testimony of Eugene Sanden.)

man operating a single store, such as here, may operate within his income and with the help he can get. So, we will pass that point. If I am wrong, I am wrong and we will stand on that statement. It is based on the theory [221] we still live in America; the Constitution still goes. The rights of the individual may be taken where more need requires it, but not where it is not necessary. There is one thing that interests me in this case—how can a man be expected to know what an article was selling for in the year preceding?

Q. Mr. Sanden, you have been charged that the descriptions of the articles listed were indefinite, uncertain and confusing, and that it was impossible to determine what articles were priced, or the prices thereof. Explain to the Court that situation.

A. Well, it comes back to the point I have already tried to make; that we were operating under difficulties and those that were taking the inventory, the help taking the inventory, were instructed to do the best they could. Now in many of these instances here relative to these pieces of yard goods, because of the fact that we do not have a permanent inventory system, there is no name or no lot number often times on these bolts, simply the cost and selling price, so unless the person taking the inventory for the purpose of these price lists, cost of living commodity price list, could identify the goods sufficiently to show who the manufacturer was through memory or knowledge, why they simply had to give up; just do the best they could; that

(Testimony of Eugene Sanden.)

was the best that was possible under the circumstances.

Q. Is that the reason for the numbers being left off of the inventory?

A. That is correct.

Q. That is, of this listing?

A. That is correct. [222]

The Court: As I understand it, there wasn't any bolt number to put in the list?

A. There wasn't; if there had been it would have been in the list because I was born in this community, I have grown up here and I think generally I have the respect of the community. I don't try to lie or cheat or defraud anybody and we did the best we could and that is all there is to it. I have lived too long to try to do that sort of thing. I am about fifty years of age and after that length of time in one community I try to do the best I can and let it go at that.

Q. Mr. Sanden, you have been charged in the Complaint that the statement did not contain an appropriate description or identification of the many commodities listed. That pertains to an appropriate description or identification?

A. Well, it goes back to the same thing again. We were unable to do it in some instances. Generally speaking I think we did in the large percentage of cases, but there were exceptions where we couldn't identify them, but it was not through any intent to not identify; it was simply a failure——

The Court: Who determines what an appropri-

(Testimony of Eugene Sanden.)

ate description is? Is there any rule by which you can measure known to you?

A. No, as I understand it, the Office of Price Administration leaves the descriptions to the party, to the common sense and judgment of the person who is making up the list. There is no definite ruling on that score so far as I am able to understand. You are supposed to do the best you can and that is all they are supposed to require of you.

The Court: That is all they have a legal right to require of you. Did you have any discussion of that matter with Mr. McDermott? [223]

A. Yes, I did.

The Court: Did you have any with Mr. Wertz?

A. I did with both of them; I told them exactly what we were up against.

The Court: Did you have a discussion with Mr. Anderson?

A. Yes, I did.

The Court: Just tell us what that discussion was; what you said and what they said as near as you can recall.

A. Well, I saw Mr. Wertz in his office; I think it was before I went to see Mr. Anderson and Mr. McDermott, and we went over the whole situation at that time. I told them the difficulties I was having in connection with operating the store and our help problem and that I had been delayed on account of all these people leaving me and I was obliged to take on new help where I could get it, and obliged to do without help where I couldn't

(Testimony of Eugene Sanden.)

get them. We had a warm discussion for a little while and Mr. Wertz said, "We don't care anything about that; all we care about is you get this in. That is all there is to it." He said, "Close the store if necessary and go ahead; close the store and get the list out." I said we couldn't. He said, "That's your patriotic duty." I said, "See here, Mr. Wertz, I don't want to discuss it because I have never had the matter brought up in connection with me before; but," I said, "I have no apologies to make for my patriotism under any circumstances." And when we got through talking he was very much nicer about his attitude toward me and we left on speaking terms at least. Well, it was a little later on my sister and I went over to the price officers, Mr. Anderson and Mr. McDermott; we talked the thing over; we were all right. We told them our problem and our [224] difficulties and I explained to them about Florence coming through at this time made it possible to have someone who knew something about stores, our store, to go ahead and take charge of the getting together of these prices and typing them out and making the list of them. And we inquired of them just what we should do and their answers were more or less indefinite; they simply handed me a booklet—"Here's a booklet." They showed me a list one of the other merchants in town had made. I believe it was Christie's, Nifty Bill's Store, across the street from us, that they had sent in. So we looked that over and we took this little booklet and went back to the store and went to work and did the best we could.

(Testimony of Eugene Sanden.)

That is all there was to it. There wasn't any exact information; he just simply gave us the information contained in that booklet, and of course there was nothing else much they could do, but with Mr. Wertz I had it rather hot and heavy and I didn't like his attitude in the matter at all.

The Court: As I understand it from your testimony, you were engaged as a participant in the last World War. A. I was.

The Court: And still a man who hadn't been in the war was questioning your patriotism?

A. Yes, sir.

The Court: It made you angry?

A. Made me quite angry because immediately upon the declaration of war I paid my fare to the ROTC at Stanford and stayed there until the fall, and then I joined the Army Ambulance Corps. I was in the service two years and I was overseas for over a year; I was up in the thick of things for a while.

Q. Mr. Sanden, in February, 1943, your cost of living commodity [225] statement was prepared. Now that was prepared at the same time with this other list, was it not? Were they in together? Are they part of the same thing?

A. Yes, in a way. The cost of living commodities are a special list of items that are considered to be basically essential to the average purchaser and they are set up as a cost of living list. Now that list is something that must be filed with the Sugar Board down here. The basic price list is

(Testimony of Eugene Sanden.)

all the rest of the goods that you have in the store that is supposed to be kept on file in your establishment for customers to see. And by the way, let me explain that I haven't had one single customer question our prices in our establishment in all this time. I have never been taken before the Sugar Board.

The Court: What has the Sugar Board to do with dry goods?

A. If anyone should make a complaint against us on the price basis, any individual, we would be referred to—not the Sugar Board, but it is this group of merchants, business people, that hold meetings every Monday evening down there to try to iron out difficulties between customers and business establishments, but never once have I been called before that board.

Q. That is the County Ration Board?

A. I have never been called before it. And another thing I want to explain is this, that if a customer ever purchases anything from us and it isn't satisfactory, they can bring it back and get their money back, so they can't be hurt. We have people now to this day since Christmas time bringing back gifts, bringing them in to us; we are refunding their money; we are giving them money for gifts they got from somebody else, so they can't be hurt so far as our policy is concerned.

Q. You have been charged this cost of living commodity statement [226] listed articles that were too indefinite and uncertain and confusing and did not contain an appropriate description or identifi-

(Testimony of Eugene Sanden.)

cation. In other words, that refers back to the same testimony that you have explained to the Court with relation to the base period statement, does it not? A. Yes, it does.

Q. You have been charged that you were offering for sale cost of living commodities not listed in the statement. Is that true?

A. Well, it is possible that we have done that because of the fact that there were new articles arriving from time to time. We come right back to the help problem, problem of assembling all these things together and getting out these lists and filing them with the Sugar Board; maintaining a permanent inventory again, practically speaking.

The Court: I think the Court understands what the Sugar Board is now.

A. It is commonly called that, I believe. The Price and Ration Board.

Q. Mr. Sanden, you have been charged in the Complaint that there are no supplemental statements filed or prepared by you. That refers, does it not, to the monthly additions?

A. That refers to keeping that matter up to date, and, as I say, due to the fact that it was a question of keeping the doors open or a question of closing up and getting out the lists. I thought the best thing to do would be to take the former course and give employment to the people in the store and maintain activity on Main Street and the establishment and try to go ahead and do the best I could, and then if I had a chance to get some of the stuff out, I would do so. It has been almost [227]

(Testimony of Eugene Sanden.)

impossible. As a matter of fact I have a month's work staring me in the face right now apart from this.

Q. You have been charged in the Complaint that you failed to post or display a maximum price. Is that true?

A. That isn't true at all. Everything is marked in plain figures; a bolt of goods has the price marked on the end of the bolt. A suit of clothes has a ticket on the suit. A ladies' hat has the ticket in the hat, so that is absolutely an untrue allegation.

Q. But what about the ceiling price?

A. It may be that in some instances where probably the stamp ceiling price doesn't appear, but that happens just because of the fact we haven't the help to take care of those things and see it is all done as these things come and go.

Q. You have been charged in the Complaint that in March, 1942, the highest price you sold gingham, denim, challis, rayon, eyelet, gaberdine, jersey, overalls, Indian head, percale, diapers, bur-lap, sateen, and ticking was one figure for each, and then in February and March that you sold each of these articles for a higher figure. Is that true?

A. February and March, 1943? No that is not true. There have been no markups at all; that isn't true. There have been no markups in prices. It may be that new goods have come in and taken on those new prices, but there have been no markups

(Testimony of Eugene Sanden.)

of the old goods in the house at that time. You go down to the store today and you will find the original tickets on things that have been there a couple years and the prices are the same. If I wanted to be smart I could go ahead and increase the prices and get away very nicely, but I am not interested in that sort of thing; that kind of thing doesn't interest me. [228] But the original tickets are on everything just as they come in and are originally marked.

Q. You have been charged that the highest price of each of these articles sold for, or were offered for sale in March, 1942, was one figure for each, but that you listed the price for each in the base period and cost of living commodity statement for that period at a higher figure for each and therefore you falsely represented the price——

A. That isn't true.

Q. Is that true?

A. No, that is absolutely not true.

Q. Explain to the Court how through the investigation that was made by the Price Administration by the comparison of slips from one time and slips of another time that difference of prices can arise and show up.

A. Well, that's simply due to the fact that new goods keep coming in to the house; we are trying all the time to keep a stock of goods on hand sufficient to do business with. As these new things come in a sale may be made from this,—a dozen sales, twenty sales,—the prices will vary, likely

(Testimony of Eugene Sanden.)

because of different goods, different quality, different texture and widths, and so forth, from goods that have been on hand prior to them. On the other hand, there may have been goods on hand in March, 1942, that we had on hand two years, three years; sometimes certain articles don't go very fast, they stay on hand. You get a fast turning goods and it is impossible to identify any of those articles in piece goods for the simple reason piece yardage doesn't have anything on it by which to identify it.

Q. Explain to the Court what causes the costs and prices of these various types and classes and qualities of goods. What [229] would make the different prices in a towel?

A. The quality of the towel; the size of the towel, the texture, the finish; there are so many things that it would require a book to answer that. As a matter of fact the matter of the manufacturer and construction of material is a study in itself that requires a lifetime. It isn't as simple as that. But so far as we as a little merchant in this community are concerned, we try to gauge the price according to—we add our cost of doing business; we try to figure a small profit in there, that's how we arrive at our prices of all these things. Of course, some things cost less, why, naturally as a general rule, the price will be less.

Q. You have seen introduced in evidence here in Court these various slips representing sales of

(Testimony of Eugene Sanden.)

goods. Can you tell by looking at a slip the exact article that was sold?

A. No; that's because of the fact we don't keep a permanent inventory. If we sell a yard of spun rayon we put down spun rayon at such and such a price and carry it out to its figure. If you have a permanent system of inventory the sales slip would require you to show the lot number and other description of it so that when that ticket reached the office there would be a personnel at the office who have charge of the permanent inventory system to deduct that two yards from the item in the book that they have showing that there were forty yards of that particular spun rayon on hand; therefore after this date there would be only thirty-eight. It is a system of very exact accounting.

Q. Could you tell by looking at a slip that represented a sale in 1943 as of March and February and tell whether or not that is the same article that was in the store as of March, 1942? [230]

A. No, we couldn't, could tell nothing from them sales slips, absolutely nothing.

Q. You have seen introduced in evidence a bunch of slips, say five or six or ten or twenty or twenty-five, referring to a particular article that was sold for a particular price in 1942, have you not? A. Yes.

Q. And you have also seen slips written thereon with the same name of article, whether it be challis, burlap, representing the highest, or at least the ceiling price for a particular article as of 1943.

(Testimony of Eugene Sanden.)

and there may be six or ten or twenty or twenty-five. Explain to the Court that situation when the prices are different. That is the range of prices in 1942 might be 39c, and the range of prices in 1943——

A. It is due to the fact that it is probably different goods. For instance you take spun rayon. That is essentially a style article, that is to say, a texture. This spring or this fall would be different from a texture that women might want the following season, and consequently a spun rayon of this spring or this fall say would be a little bit lighter in weight, or have more luster, or more pile or nap to the finish than spun rayon you might get in the following season because the demand would be different. So it is in all textiles, there is constant change, constant turnover. The only thing basic is a muslin, and even there you have so many different varieties and kinds that it is impossible to say from one shipment to another whether or not you are getting the same thing. They usually come in with different markings, different numbers and listings. You never can duplicate—very rarely you can duplicate anything in piece goods. [231]

Q. If the time instead of being March, 1942, might have been July or August of 1942, and an investigation was made as of in this case in 1943 in March or February, would it be possible that these figures would be the same, or would there be a different picture?

(Testimony of Eugene Sanden.)

A. There is bound to be a different picture for the reasons I have stated.

The Court: Just like the change in the body outline of the automobile, the mode is there, but they put little changes on the outside so that the old goods become outmoded and the new goods go on the market. The Court understands that; no use in covering it.

Q. Now you have been charged, Mr. Sanden, that you sold or offered for sale during March, 1942, kinds, qualities and widths of each of these named commodities at lower prices than you listed them, and that you failed, neglected, and refused to include the less expensive kinds and qualities in the base period statement. Is that true?

A. No, it isn't true generally. It may be that we had a remnant that was ready to be put in the remnant pile and consequently it may have been sold for half price, or it may have been defective. Often times you go through yardage and you find misstriping and you sell it for less. Or it may have been a piece of goods—we are human beings; we are not one hundred percent accurate, never have been and don't suppose we will ever be. There were instances where, no doubt, a piece of goods was overlooked. It may have been a lower price, or just as well as a higher priced piece. I can't say definitely just what happened with regard to any one particular thing, but that is the likely idea behind the whole matter. [232]

(Testimony of Eugene Sanden.)

Q. Now, Mr. Sanden, you have been charged that since the 18th day of March, 1942, you sold or offered for sale commodities for which maximum ceiling prices were established by the General Maximum Price Regulation, and that you failed and neglected to keep records showing the basis upon which you determined the maximum ceiling prices of such commodities. Is that true?

A. No, we haven't failed to keep records. We keep all records we have ever had.

Q. In other words, you are maintaining the same records now you always maintained?

A. We are maintaining the same records we always have, there has been no effort, and so far as any matters of this case are concerned, I think even the investigators testified we dealt absolutely up and above board. We just turned everything over to them and they took these things over to the hotel; they didn't examine them in our place of business. I said, "Yes, go ahead and take them over." I had no idea the case was going to be brought against us.

The Court: Went over to the hotel? What do you mean by that?

A. The Placer Hotel at the State Office of the Office of Price Administration.

The Court: The State Offices are maintained there? They took them to their main office?

A. The main office of the Office of Price Administration in the Placer Hotel, all of our records; there had been no slips taken out or destroyed, nothing at all. We have given everything they

(Testimony of Eugene Sanden.)

wanted and we kept everything intact just the same as we always have.

Q. Mr. Sanden, when was it you first realized that they were preparing an action against you with relation to the preparation [233] of these statements?

A. Well, I felt, I was not certain, but I felt that when they were so persistent in their investigation that they had some case on hand against us; that was in March, I guess it was in March, 1943.

The Court: That is a question for me to determine whether they had a case or not.

(At this point the Court took a short recess after which the following proceedings were had:)

Cross-Examination

By Mr. Wohl:

Q. On direct examination you stated that Loren Anderson and Mr. McDermott only told you generally what you should do with regard to the two statements in question? A. That is correct.

Q. You also testified they gave you a book?

A. That is correct.

Q. Now there is introduced in evidence Plaintiff's Exhibit No. 4, "What Every Retailer Should Know About the General Maximum Price Regulation." Is that the book you referred to?

A. That is correct.

Q. You also testified on direct examination that if there were any differences in prices as disclosed by the sales slips, they were probably due to the

(Testimony of Eugene Sanden.)

fact you were getting in new merchandise in stock?

A. That is in part correct, yes.

Q. How did you arrive at your maximum selling price for that new merchandise?

A. Well, according to our system of markup.

Q. That is, you just took your regular markup?

A. Yes. [234]

Q. Did you try to determine whether they compared with the articles that you may have been selling in March, 1942?

A. Oh, yes, we do that right along.

Q. Do you keep records of those?

A. If we have something similar on hand we try to keep in line. However, I wish to explain this that many things that could have been had in March, 1942, are not available today at all, but we try to keep within range of what we consider to be, well, a price that it has been customary for the people to pay,—if that answers your question.

Q. Do you take a definite markup above cost?

A. We have no definite system of markup. As in the case of overalls, we sell below what they cost us.

Q. If you got a new shipment of a different quality of any yard goods, how would you fix the selling price of that?

A. Well, we, we I say, figure our original cost; we figure the transportation, cost of doing business into the price, and then a modest markup of profit.

Q. Would you go back and try to compare that particular new commodity?

(Testimony of Eugene Sanden.)

A. There would be no use in making a comparison if it was a different thing.

Q. Would you make any attempt to compare that new commodity with any commodity that you handled in March, 1942?

A. Well, if I had the 1942 commodity on hand I would, yes. If it were the same thing approximately within the range of that thing, similar in some way, I would try to; however, there has been, so far as the price increase is concerned, the price increase has been hidden in depreciation of quality. Take a boy's shirt, now a boy's shirt that at one time sold [235] for 69c would probably sell for \$1.25 today. But our maximum price on a boy's shirt, I think, was \$1.25; that is a boy's printed broadcloth shirt, and these shirts today we sell for \$1.25 are not as good quality shirts as the shirts we previously sold for \$1.25, but it is within the maximum price we established on that particular kind of article, although it costs us a great deal more today. A boy's shirt costs \$11.87½ a dozen in St. Louis and New York, and we sell it for \$1.25, but it isn't the quality shirt the shirt used to be we sold for \$1.25 that cost us less than \$11.87½ a dozen.

Q. Getting back to yard goods, now, if you didn't have the same article, if you didn't have any yard goods on hand which you could compare the new yard goods with, how would you arrive at your price? Just take a definite markup?

A. Through markup. What we take into consideration is we try to be competitive; we try to be

(Testimony of Eugene Sanden.)

in line with all others selling the same kind of fabrics for, or similar for. We take that into consideration also. There are so many details in the matter of marking a piece of goods that to give a full explanation is almost impossible.

Q. You are acquainted with the provisions of the General Maximum Price Regulations, are you not?

A. I have read them through.

Q. You are a member of the Montana Bar?

A. Yes.

Q. You have an LL.D.?

A. I have a B. L. Degree from the University of Chicago.

Q. You understand there are definite means of pricing various articles under the General Maximum Price Regulations?

A. Well, yes there are with regard to the same article. [236]

Q. And if you do not handle the same article now as you did in March, 1942, you understand you are to price it according to a similar commodity you handled in that period, don't you?

A. If it is similar enough to be the same. If it is a different article there is nothing in common.

Q. What would you mean by a different article?

A. Different article? I just simply mean a different article; different quality, different texture, different finish, different style.

Q. You understand that if you are unable to price the article according to a similar commodity, you are to shop your competitor?

(Testimony of Eugene Sanden.)

A. I have never done it and I don't propose to do that. I am not going to shop competitors.

Q. Now referring to your employees, how many people do you have employed in the store at this time, Mr. Sanden?

A. Well, I think probably we have about fifteen.

Q. What is your average?

A. About twenty.

Q. Would you say that the average number of employees during 1942 was about twenty?

A. Yes, I would.

Q. How about 1941?

A. I would say it would be about twenty.

Q. You would say 1943 has been about the same?

A. In 1943 it has been less all the way through; from four to five people less.

Q. Isn't it a fact, Mr. Sandeen, that in your report to the Unemployment Compensation Commission in the month of January, 1943, you made a return that you had twenty-four people employed [237] by you?

Mr. Smith: Objected to as not proper cross-examination.

The Court: He spoke of lack of assistance as having a bearing on what he was able to do, so I think it is within the limit. Overruled.

A. It may be true that at that particular time we did have, but mostly that was in January, 1943, the first of the year—it would be the end of the year, 1942—that was mostly green help we had at Christmas and inventory; incompetent mostly.

(Testimony of Eugene Sanden.)

Q. Isn't it a fact in the month of February, 1943, you made a return that you had twenty-two employees? A. In February, 1943?

The Court: Just a moment. The rule is that in examining a witness with reference to a writing you must submit the writing to him for his consideration before he is required to answer any question. In other words, we don't lay traps. If he did make the return you have it before you. You may examine him with reference to what the return shows, but you must submit the return to him.

Q. Isn't it a fact that during February, 1943, you had twenty-two employees?

A. I couldn't remember off-hand.

The Court: The Court ruled upon that question; he doesn't know. The Court has ruled that if you are going to examine the witness on a return that may have been made you must submit it to him. You might refresh his memory, but clearly before you can examine him on anything of that nature, you must submit the writing to him. The Court has ruled on that and the ruling stands.

Mr. Wohl: Does that also pertain to the year 1942?

The Court: It pertains to all the years and all the months. [238]

Mr. Wohl: I am just asking a general question.

The Court: He has stated several times it is impossible for him to answer that form of question. "I don't know," and if he doesn't know he can't testify, because one can only testify to things he

(Testimony of Eugene Sanden.)

knows of his own personal knowledge. The rule is well grounded; the Court has merely applied it.

Q. You testified on direct-examination that the prices were marked on all articles?

A. Yes, that is true.

Q. What prices were you referring to, the maximum prices or the selling prices?

A. The maximum prices. The maximum prices in practically all instances are the selling prices unless we have a sale.

Q. Do you have the word maximum or ceiling price marked on all articles?

A. We may not have it on the article; we have it on the box or list. As I say, there are some instances, probably a few, that we have overlooked. We are not 100% by any means, but we are largely all right. For the most part we have them marked.

Mr. Wohl: That is all.

Mr. David Smith: That is all, your Honor.

The Court: Any rebuttal?

DONALD I. CREEL,

having been previously sworn and having previously testified as a witness on behalf of the Plaintiff, was recalled by the Plaintiff on rebuttal and testified as follows:

Direct Examination

By Mr. Wohl:

Q. You are the same witness who hertofore testified?
A. Yes.

(Testimony of Donald I. Creel.)

Q. Mr. Creel, I believe you testified on direct-examination as to the time that you made your investigation of Sanden and [239] Ferguson Company?

A. Yes.

Q. What were the dates of that investigation?

A. March 23 to March 31, 1943.

Q. Now during that period how many days were you actually in the Sanden and Ferguson Company Store?

Mr. David Smith: Objected to as not proper testimony for rebuttal.

The Court: I think the testimony is to the effect that approximately three weeks were consumed in this investigation. Overruled.

(Question read by the reporter.)

A. I can't say off-hand. Most of that time was spent in the state office. We were—Miss Clark and myself were in the store on the 23rd of March and we made one or two trips back to talk to Mr. Sanden and to inspect some of the merchandise. I made one trip back to return the sales slips which I believe was within,—probably the 31st of March, the last day. Then I made one other trip back on May 15th, was all I recall. Now I may have gone back to the store at some other time after that. I recall having gone back to the store, oh, probably three or four times.

Q. Did you commence your examination of the sales slips in the store?

A. Yes, I did.

Q. And why did you not finish in the store?

A. Well, we didn't have a very good place. While they did furnish us a table to work on, it was hardly

(Testimony of Donald I. Creel.)

large enough, and, too, we were exposed to the public.

Q. Where was that table located? [240]

A. That was in the basement in the furniture department.

Q. Did you request of Mr. Sanden permission to take the sales slips to the Office of Price Administration? A. Yes.

Q. Were you acquainted with Wesley Wertz?

A. Yes.

Q. Do you know where Wesley Wertz is at this time?

A. I understand he is in the Navy.

Q. Do you know whether he is present in Helena?

A. No, he isn't working with the Office of Price Administration any more.

Cross-Examination

By Mr. David Smith:

Q. As a matter of fact, you were making an investigation of the records of Sanden and Ferguson Company, that is the Office of Price Administration was, even in the latter part of 1943, were you not?

A. Not to my knowledge; not me, no sir.

Q. In other words, it is possible that there might have been agents of the Office of Price Administration in the store even in the latter part of 1943 going over records and copying down statements, isn't that a fact?

A. Not to my knowledge, sir.

Q. But there might have been?

(Testimony of Donald I. Creel.)

A. Well, I couldn't say; I don't know. Personally I have been on the road most of the time. I have had nothing more to do with it since May 15th. I know nothing more about it.

Q. Somebody else might have been in Sanden & Ferguson Company in the latter part—

The Court: He simply told us he doesn't know; that should end that examination. [241]

Q. Then, Mr. Creel, do you know whether or not records were taken to the main office in the Placer Hotel and examined after you left?

A. Not to my knowledge.

The Court: I thought you testified you took them there for examination because you were not provided proper quarters?

A. Maybe I didn't understand the question.

The Court: Your testimony indicates that you did take the records to the Main office of the Office of Price Administration.

A. I misunderstood the question; I thought you asked if I had taken them back after that. Repeat the question, please.

(Question read by the reporter.)

A. On March 23rd? We took them there at that time.

Q. And even continuing on beyond March 31st?

A. I am positive that they were returned on March 31st; I can't say just what day.

Q. In other words, the only investigation that you are referring to is the investigation you yourself made?

A. Yes, sir.

(Testimony of Donald I. Creel.)

The Court: What are these records produced here in court?

A. Those? I understand they are the files you requested from Mr. McDermott. I don't know; I never seen them before.

The Court: Will counsel inform me what they are?

Mr. Wohl: After the close of court you requested that Mr. McDermott bring up here this morning the card index file of the Office of Price Administration and he has done so and these files are the card index file.

The Court: Relating to all matters under investigation by the Office of Price Administration? [242]

Mr. Wohl: I believe it came up in regard to whether or not the Sanden and Ferguson Company had been served with a copy of Maximum Price Regulation 330. I believe Mr. McDermott stated they had been and you inquired as to how he knew, and I believe his answer was they have a card index file and you requested he bring the card index file to court this morning.

The Court: Very well, you can examine him: this witness doesn't know. Call the next witness.

Mr. Wohl: No further rebuttal on the part of the Plaintiff.

The Court: Mr. McDermott, come forward please. What are the records you produced in court this morning?

Mr. McDermott: Those records, to the best of my knowledge, are records of all the merchants that have

(Testimony of Donald I. Creel.)

anything to do with the commodities sold in the State of Montana. That was compiled for the purpose of serving the merchants with the information regarding what regulations pertain to them to the best of our ability.

The Court: I notice in those records markings. What is the purpose of those markings? They are what we lawyers call dog ears.

Mr. McDermott: The Clerks were working on them this morning, correcting some of the addresses and changes of ownership and one thing and another that transpired since the first of the year in the various stores. They were working on them when I took them from them this morning.

The Court: Has any part of the record any specific bearing on the business of the Defendant here, Sanden and Ferguson Company?

Mr. McDermott: Only to the extent that his card is listed in there stating the commodities he carries so that any [243] regulation received pertaining to his business, that he is included in that mailing list.

The Court: Is there any contention that those cards are not correct?

Mr. McDermott: That's possible; I didn't make them up.

The Court: Then again we are confronted with the fact you don't know?

Mr. McDermott: I am afraid so. The only thing I have is the stencil is cut, that the girls in the mailing office used to run it through the mimeograph;

(Testimony of Donald I. Creel.)

when they mimeographed it they put it in envelopes to go to the merchants.

The Court: That's all.

Mr. David Smith: If the Court please, we would like to call Mr. Sanden back and ask him one question if it is permissible.

The Court: It is permissible if it is within the rules of law relating to sur-rebuttal.

EUGENE SANDEN,

having been previously sworn and having previously testified, was recalled by the Defendant on sur-rebuttal and testified as follows:

Direct Examination

By Mr. David Smith:

Q. Mr. Sanden, you heard the testimony here in rebuttal with relation to the investigation of the Sanden and Ferguson Company being made by agents of the Office of Price Administration as to the period of time that they used for making the investigation? A. Yes.

Q. Was there to your knowledge an investigation of the store after March 31, 1943?

A. Yes, there was; on December 15th at 3:30 Miss Clark and another lady came to the store and I was waiting on a customer [244] in the furniture section, and while I was waiting on this customer Miss Clark walked up and said she would like to see the basic price list and I told her all right; I would

(Testimony of Eugene Sanden.)

let her see it. She said she wanted it for checking, and so I went up to the Office and got the basic price list and gave it to her and then she wanted to occupy the desk upstairs for checking purposes and I told her that desk was used by one of the office girls and I said, "You can go down to the basement." And I began to wonder then after we had been down there for a minute just what she was up to. I went and asked her. I said, "Miss Clark, just why do you want this basic price list?" I said, "You have examined this before and gone over it and had it over in the Placer Hotel." She said, "We want to make a copy of it; we want to make a copy of it for Mr. Wohl." And I said, "Well, I don't think I will let you do that," I said, "I think you better give that list back to me and if Mr. Wohl wants to find out anything about the articles in connection with the complaint, Mr. Wohl can come over and see me and I will be glad to give him any information I have." That was on December 15th, ten days before Christmas when the store was full of customers and we were busy as could be. She walked up to me while I was waiting on a customer with this other lady.

Q. Did you furnish it to Mr. Wohl at a later time?

A. I have never spoken to Mr. Wohl about it, but I made a note of it at that time and put it on a slip of paper.

Mr. David Smith: We would like to make a motion that the case be dismissed on the ground the Plaintiff failed to prove the allegations of its Complaint.

(Testimony of Eugene Sanden.)

The Court: Very well, the motion will be taken under consideration. How much time do you wish for briefs? [245]

Mr. Wohl: May we have twenty days after the submission of the transcript?

The Court: And how much time does the Defendant wish?

Mr. Smith: We would like twenty days after we get Plaintiff's brief.

The Court: Let the record show that at the conclusion of the testimony the Plaintiff was granted twenty (20) days after receipt by it of a copy of the transcript of the proceedings herein in which to serve upon counsel for the Defendant proposed findings of fact and conclusions of law and memorandum of authorities in support of its contention; that the Defendant is granted twenty (20) days after service of these proposed findings of fact and conclusions of law and memorandum of authorities in which to serve upon the attorney for the Plaintiff Defendant's proposed findings of fact, conclusions of law and memorandum of authorities in support of its contentions, the Plaintiff to have ten (10) days thereafter in which to serve upon counsel for the Defendant memorandum of authorities in opposition to Defendant's contentions, and that upon the doing of these things, or the expiration of the time within which they must be done, the case will be considered as submitted and by the Court taken under advisement.

[Endorsed]: Filed Sept. 11, 1944. [246]

Thereafter, on September 12, 1944, Plaintiff's Petition for an order to forward original exhibits to the Circuit Court of Appeals, was duly filed herein, in the word and figures following, to-wit: [247]

[Title of District Court and Cause.]

PETITION

Comes now the Plaintiff, and asks the Court to enter an Order herein, instructing the Clerk of the Court to forward the original exhibits, numbered 1 to 27, both inclusive, in this cause to the Circuit Court of Appeals for the 9th Circuit in connection with the appeal taken herein.

FLEMING JAMES, Jr.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff

Received a copy of the foregoing this 11th day of September, 1944.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant-Appellee

[Endorsed]: Filed Sept. 12, 1944. [248]

Thereafter, on September 12, 1944, Order to send original exhibits to the Circuit Court of Appeals was duly filed and entered, in the words and figures following, to-wit: [249]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard this 12 day of September, 1944, upon the petition of the Plaintiff that the original exhibits, numbered 1 to 27, both inclusive, in this cause be certified to the United States Circuit Court of Appeals for the 9th Circuit, and the Court being advised in the premises,

It is Ordered that the Clerk of this Court forwarded to the United States Circuit Court of Appeals, in connection with the appeal now being taken in this matter, all of the original exhibits herein, being numbered 1 to 27, both inclusive.

JAMES H. BALDWIN

United States District Judge

[Endorsed]: Filed and Entered Sept. 12, 1944.
[250]

Thereafter, on September 21, 1944, Defendant's Designation for Additional Portions of Record on Appeal, was duly filed herein, in the words and figures following, to-wit: [251]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION FOR ADDITIONAL PORTIONS OF RECORD ON APPEAL

The Clerk will please add the following portions of the record to the record on appeal as requested by the plaintiff, to-wit:

Motion for more definite statement or Bill of Particulars;

Plaintiff's Objections to Defendant's Motion for Bill of Particulars;

Order Denying Defendant's Motion for a more definite statement or a Bill of Particulars.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant

Received a copy of the foregoing this 21st day of September, 1944.

FLEMING JAMES, Jr.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 21, 1944. [252]

Thereafter, on September 25, 1944, Plaintiff's Supplemental Designation of Record on Appeal, was duly filed herein, in the words and figures following, to-wit: [253]

[Title of District Court and Cause.]

PLAINTIFF'S SUPPLEMENTAL DESIGNA-
TION OF RECORD ON APPEAL

In addition to the records, proceedings and evidence heretofore requested by plaintiff in his Designation of Record on Appeal, heretofore filed and

served herein, plaintiff requests that the following additional portions of the record be made a part of the record on appeal to the Circuit Court of Appeals of the 9th Circuit, to-wit:

(1) Petition to certify plaintiff's exhibits, numbered 1 to 27, inclusive, to Circuit Court of Appeals in their original form, (2) order directing the certification of plaintiff's exhibits, numbered 1 to 27, inclusive, to the Circuit Court of Appeals in their original form, (3) Plaintiff's Notice of Appeal with date of filing, (4) plaintiff's Designation of Record on Appeal, (5) defendant's Disignation for Additional Portions of Record on Appeal, (6) plaintiff's Supplemental Designation of Record on Appeal, and (7) Statement of Points on which Appellant Intends to Rely on Appeal.

FLEMING JAMES, Jr.

DAVID LONDON

MAX D. MELVILLE

CLARENCE E. WOHL

Attorneys for Plaintiff

Received a copy of the foregoing this 25th day of September, 1944.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Defendant-Appellee

[Endorsed]: Filed Sept. 25, 1944. [254]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing Volume consisting of 254 pages, numbered consecutively from 1 to 254, inclusive, exclusive of the Index and this Certificate, is a full, true and correct transcript of all portions of the record and proceedings in case No. 173, Chester Bowles, Administrator Office of Price Administration, Plaintiff, vs. Sanden and Ferguson Company, a Montana Corporation, Defendant, which have been designated by the parties to be incorporated into said Transcript, as appears from the original records and files of said court in my custody as such clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith as a part of the record on appeal, the following exhibits introduced and received in evidence at the trial of said cause, to-wit: plaintiff's exhibits numbers 1 to 27, both inclusive.

I further certify that the costs of said transcript amount to the sum of Thirty-eight and 50/100 Dollars. (\$38.50) and have been made a charge against the United States.

Witness my hand and the seal of said court at Helena, Montana, this 17th day of October, A.D. 1944.

[Seal]

H. H. WALKER

Clerk U. S. District Court,
District of Montana. [255]

[Endorsed]: No. 10901. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Sanden and Ferguson Company, a Montana Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 20, 1944,

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 10901

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

SANDEN AND FERGUSON COMPANY, a Mon-
tana Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

The following is a concise statement of the points on which appellant Chester Bowles, Administrator, Office of Price Administration, intends to rely on his appeal from the judgment on the above entitled cause to the United States Circuit Court of Appeals, for the Ninth Circuit:

(1) The Court erred in entering a final judgment of dismissal of the action and the cause of action.

(2) The Court erred in entering a final judgment denying to appellant any of the relief prayed for in his complaint and dismissing plaintiff's action.

(3) The Court erred in denying the motion of appellant to strike certain portions of appellee's answer, which said portions sought to be stricken are set forth in appellant's motion.

(4) The Court erred in refusing and failing to enter judgment in favor of appellant and against appellee, and granting to appellant relief as prayed for in his complaint.

(5) The Court erred in making its Finding of Fact numbered 15 to the effect that on or about February 1, 1943, defendant prepared a base period statement, on the basis of all available information and records, showing the highest prices which it charged for such of those commodities as it delivered during March, 1942, and its offering price for delivery of such commodities during such month, together with an appropriate description and identification of each of such commodities, in so far as defendant was able to do so, for the reason that the undisputed evidence adduced at the trial disclosed that in preparing said base period statement and cost-of-living commodity statement defendant listed therein the commodities it was selling and offering for sale in January and February, 1943, with the prices then in effect, and that it made no effort to determine the kinds or qualities of commodities sold during March, 1942, nor the March, 1942, selling prices thereof.

(6) The Court erred in making its Finding of Fact numbered 17 for the reason that there is no evidence in the record that either Lorin Anderson or Stephen T. McDermott, officials in the Office of Price Administration, in January, 1943, advised Eugene Sanden, Assistant Manager of defendant company, that it would be all right for defendant to

prepare a base period statement and cost-of-living commodity statement, as required by Sections 1499.11(b) and 1499.13(b), respectively of the General Maximum Price Regulation, by taking the merchandise that was in defendant's store at that time.

(7) The Court erred in making its Finding of Fact numbered 23 for the reason there is no evidence in the record that in order for defendant to furnish in its base period statement and cost-of-living commodity statement all of the information required by the General Maximum Price Regulation that it would have to change its business practices, cost practices and methods by installing a permanent inventory system which would cost at least \$2,000, and require defendant to employ two additional bookkeepers and compel defendant to close its place of business because of the additional expense.

(8) The Court erred in making its Finding of Fact numbered 24 for the reason that there is no evidence in the record that the base period statement and cost-of-living commodity statement were carefully made by defendant in an honest effort to meet the requirements of the General Maximum Price Regulation. The undisputed evidence adduced at the trial showed that defendant did not prepare either statement until in January and February, 1943, after it had received a Warning Notice, and that it made no effort to determine the prices at which it sold and offered to sell merchandise for in March, 1942, other than to list the prices at which it sold and offered to sell merchandise for in Janu-

ary and February, 1943, which prices defendant claimed were in effect in March, 1942.

(9) The Court erred in making its Finding of Fact numbered 27 in that the undisputed evidence adduced at the trial showed that the six sales of gingham, a yard goods mentioned in said findings, were the only sales of said gingham made by defendant during March, 1942.

(10) The Court erred in making its Finding of Fact numbered 28 in that the undisputed evidence adduced at the trial showed that the two sales of denim, a yard goods, mentioned in said finding, were the only sales of said denim made by defendant during March, 1942.

(11) The Court erred in making its Finding of Fact numbered 36 in that the undisputed evidence adduced at the trial showed that the four sales of gabardine, a yard goods, mentioned in said finding, were the only sales of said gabardine made by defendant during March, 1942.

(12) The Court erred in making its Finding of Fact numbered 32 for the reason that Lydia G Clark, testified that burlap, a yard goods, was listed in defendant's base period statement and cost-of-living commodity statement.

(13) The Court erred in making its Finding of Fact numbered 39 in that the undisputed evidence adduced at the trial was that the sale of five yards of sateen for \$2.95 under date of "2-16", and evidenced by plaintiff's exhibit numbered 24, was a sale made on February 19, 1943.

(14) The Court erred in making its Finding of

Fact numbered 40 in that the undisputed evidence adduced at the trial showed that in March, 1943, defendant failed to have posted in its store the maximum selling prices for jersey, sharkskin, Indian Head, and ticking, all yard goods; for all bed spreads; for Wamsutta, Glengary and Sonoma brand of bed sheets; for women's and girl's dresses; for women's skirts; for men's overalls; for children's hosiery; for children's gloves; and for the majority of men's work pants.

(15) The Court erred in making its Finding of Fact numbered 41 for the reason that the evidence *preponderately* shows that defendant did not endeavor in good faith to comply with and abide by the provisions of the Emergency Price Control Act of 1942, and with the rules and regulations issued thereunder.

FLEMING JAMES, Jr.

DAVID LONDON

MAX D. MELVILLE

GEORGE S. SMITH

CLARENCE E. WOHL

Attorneys for Appellant

Service of foregoing Statement of Points on Which Appellant Intends to Rely on Appeal and receipt of true and correct copy thereof admitted and acknowledged this 21st day of October, 1944.

PAUL W. SMITH

DAVID R. SMITH

Attorneys for Appellee

[Endorsed]: Filed Oct. 20, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT ORIGINAL EXHIBITS NEED
NOT BE PRINTED IN TRANSCRIPT OF
RECORD

Good cause therefor appearing, It Is Ordered that the following original exhibits,

Plaintiff's Exhibits 1, 2, 4, 5-24, need not be printed in the printed transcript of record, but may be considered by the Court in their original form.

CURTIS D. WILBUR

Senior United States Circuit
Judge.

Dated: San Francisco, Calif., November 10,
1944.

[Endorsed]: Filed Nov. 10, 1944. Paul P.
O'Brien, Clerk.

No. 10901

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT**

v.

**SANDEN AND FERGUSON COMPANY, A MONTANA COR-
PORATION, APPELLEE**

APPELLANT'S BRIEF

THOMAS I. EMERSON,

Deputy Administrator for Enforcement,

FLEMING JAMES, Jr.,

Director, Litigation Division,

DAVID LONDON,

Chief, Appellate Branch,

NATHAN SIEGEL,

Attorney,

Office of Price Administration,

Federal Office Bldg. #1, Washington, D. C.

MAX D. MELVILLE,

CLARENCE E. WOHL,

Attorneys for the Office of Price Administration,

Helena, Montana.

FILED

JAN 17 1945

PAUL P. O'BRIEN,

CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10901

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

SANDEN AND FERGUSON COMPANY, A MONTANA CORP-
ORATION, APPELLEE

APPELLANT'S BRIEF

JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Montana, Helena Division, dismissing an action brought under Sections 205 (f) (2) and (205) (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 925) to suspend defendant's license to sell certain commodities or in the alternative to restrain defendant from violating the Act and Regulations issued thereunder (R. 95-96). The judgment dismissing the action was entered July 5, 1944. Notice of appeal was filed September 11, 1944 (R. 97). Jurisdiction of the District Court was invoked under Sections 205 (c) and 205 (f) (2)

of the Act (50 U. S. Code App. § 925 (c) and (f) (2)) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. Code 225).

Provisions of the Act and Regulations

Section 2 of the Act authorizes the Price Administrator, whenever in his judgment, the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act, to establish, by regulation or order, such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. The section further provides the method by which such regulations and orders shall be drawn and become effective.

Section 202 (b) authorizes the Administrator, by regulation or order, to require any person who is engaged in the business of dealing with any commodity to furnish information and to make and keep records and other documents, and to make reports, and to permit the copying of records and other documents.

By Section 205 (f) (1), the Administrator is authorized to require "a license" of any person subject to a maximum price regulation or order as a condition to selling such commodities.

By Section 2 (a), it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or omit to do, any act, in violation of any regulation or order under Section 2, *supra*, or of any regu-

lation, order, or requirement under Section 202 (b), *supra*.

Section 205 (f) (2) provides that whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under Section 205 (f) (1), or has violated any of the provisions of any regulation, order, or requirement under Section 2 or Section 202 (b), a *warning notice* shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of such warning notice, he may petition the court for an order suspending the license of such person for a period of not more than twelve months.

SEC. 205 (a) provides "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The General Maximum Price Regulation (7 F. R. 3153, 3330) was issued April 28, 1942. It became effective as to wholesalers on May 11, 1942, and as to retailers on May 18, 1942.

Section 1499.1 of the regulation provides in part as follows:

Prohibition against dealing in commodities or services above maximum prices.—On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted this General Maximum Price Regulation;

Section 1499.2 provides in part as follows:

Maximum prices for commodities and services: General provisions.—Except as otherwise provided in this General Maximum Price Regulation, the seller's maximum price for any commodity or service shall be:

(a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:

The highest price charged during such month by the most closely competitive seller of the same class—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

Highest Price Charged During March 1942.

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or

(b) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month.

Section 1499.11 provides in part as follows:

Base-period records.—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such

commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

SEC. 1499.12. *Current records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

Section 1499.13 (b) provides as follows:

On or before June 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

By Amendment No. 1 (7 F. R. 3666), issued May 12, 1942, the date "June 1" was changed to "July 1." By Amendment No. 11 (7 F. R. 5192) the date for filing supplements to the cost-of-living commodity statement was changed from "the first day of every succeeding month" to the tenth day. The requirement that supplements be filed each month remained in full force and effect until July 6, 1943, when it was deleted from the regulation by Amendment No. 56 (8 F. R. 9025).

By Section 1499.66 of the regulation, every retailer selling any commodity for which a maximum price was established by the regulation, was granted a license, as a condition of selling any such commodity in accordance with Section 205 (f) (1) of the Act.

By Section 1499.17, it is provided that persons violating any provision of the regulation are subject to the civil enforcement actions provided by the Act, and proceedings for the suspension of licenses.

STATEMENT

The defendant is a Montana Corporation which owns and operates a department store in Helena, Montana. On April 28, 1942, the Price Administrator issued General Maximum Price Regulation (7 F. R. 3153, 3330). It became effective as to retailers, such as the defendant, on May 18, 1942. This Regulation froze prices of commodities at the highest price charged therefor in March 1942 (R. 71-72). It directed sellers to preserve for examination by the Office of Price Administration all existing records showing the prices defendant charged for such com-

modities during that month (R. 73). On the basis of such records, it required the sellers to prepare on or before July 1, 1942, a base period statement "containing all the kinds of commodities that were sold during March 1942, together with their highest prices during that month, and if no sales were made, the highest offering price (hereinafter referred to as" base period statement) (Section 1499.11). This statement was to be made available for inspection by any person during business hours. It also required sellers offering to sell cost-of-living commodities at retail, to file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing the maximum price for each such commodity (hereinafter referred to as "cost-of-living commodity"), together with an appropriate description or identification thereof (Section 1499.13 (b), R. 74). This statement was to be supplemented monthly by such information as would keep the Office of Price Administration advised of any changes in the price of cost-of-living commodities (R. 74). Under the Regulation, and pursuant to authority granted by Sec. 205 (f) (1) of the Act,¹

¹ 205 (f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regula-

every retailer selling any commodity for which a maximum price was established by the Regulation, was granted a license as a condition of selling any such commodity. This license was subject to suspension if the provisions of the Regulation were violated.

For more than a half year after July 1, 1942, the time set for filing such a statement, defendant made no effort to prepare a base period statement or a cost-of-living commodity statement, or to post the maximum price of each cost-of-living commodity as it was required to do by the Regulation. As a result, on or about January 14, 1943 a Warning Notice was sent to defendant by registered mail advising of its failure to comply in the respects indicated above (Pltf's Exh. 3, R. 28-30, 119). Defendant finally proceeded to confer with representatives of the plaintiff in Helena and was shown how to prepare his base period and cost-of-living commodity statements (Pltf's Exh. 1 and 2, R. 104, 122-123). Then, in February 1943, about seven or eight months late, the defendant filed its base period statement and cost-of-living commodity statement (Finding 19, R. 77). In March 1943, plaintiff began an investigation to ascertain whether the defendant was complying with the Act and the Regulation (R. 124). Because of practical limitations, no attempt was made to examine

tion, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202.

thoroughly into every department of defendant's store or into every sale made in the departments investigated.

It was simply a "spot" check. The investigation was confined only to a number of departments (R. 163). In each department investigated, the examination disclosed violations of the Act and Regulation. Not only were the goods sold at prices in excess of ceiling prices, but there was no compliance with the Regulation in many other respects. For example, it was found after a comparison of defendant's sales slips for March, 1942, that defendant had listed in its "base" period statement maximum ceiling prices for certain varieties of yard goods in excess of the highest price which it actually sold or offered to sell such merchandise in March, 1942 (See pp. 34-46, *infra*). Other violations consisted of defendant's failure to supplement its information respecting goods not previously carried (See pp. 30-31, *infra*); providing inadequate description and identification of the goods on its counters by which a check and comparison could be made by either a potential purchaser or by a representative of the Price Administrator (See pp. 49-50, *infra*); placing price tags on articles which exceeded the price ceiling shown on the sign which appeared at each of the counters (R. 129); and failing to properly post prices so that they could be plainly seen and understood by the purchasing public (See pp. 52-53, *infra*). The investigation in March showed that no prices were posted for such cost-of-living commodities as jersey, sharkskin and ticking, yardgoods, and for such commonly used merchandise as bedspreads,

women's and children's dresses, women's shirts, men's overalls, children's hosiery and gloves, and men's work pants (R. 127-128).

As a result of this investigation the instant action was commenced. In brief, the complaint charged the persistent course of unlawful conduct outlined above and in specific detail set forth the nature and extent of each alleged violation (R. 2-27). As relief, the Administrator prayed for a suspension of defendant's license to sell the commodities upon which there were violations, for a period of one year, or in the alternative, for an injunction restraining further violations (R. 26-28).

Defendant's answer denied generally the specific allegations of the complaint. As separate defenses, defendant charged that the Act and Regulation were in violation of the 5th Amendment in depriving the defendant of liberty and of property without due process of law because it would have to close its business if compelled to incur the expense involved in complying with the Act and Regulation; that the Act and Regulation forced the defendant to change its business and cost practices in violation of the 5th amendment; and that there was an unlawful delegation to the Administrator by Congress of its legislative authority in violation of Article 1, Paragraph 1, of the Constitution, if the defendant were compelled to change its business practices and methods (R. 57-61).

On July 5, 1944, after a trial of the issues, the District Court filed its findings of fact and conclusions of law, which sustained the contentions raised

by the defendant (R. 66-95), and entered a judgment refusing to suspend the license of defendant, refusing injunctive relief, and dismissing the action. The Court's attitude to this case may be summarized by its own words, as follows:

So, I think we will just take it for granted that the bureaucrat * * * must temper the rules to the situation in which the individual finds himself. In other words, they must cut their system in such a way that the man operating a single store, such as here, may operate within his income and with the help he can get. So, we will pass that point. If I am wrong, I am wrong, and we will stand on that statement. It is based on the theory we still live in America; the Constitution still goes (R. 207-208).

The Administrator filed his notice of appeal on September 11, 1944.

SPECIFICATIONS OF ERROR

1. The Court erred in dismissing the complaint "in its entirety, with prejudice."
2. The Court erred in refusing to grant a suspension of defendant's license as prayed for in the complaint.
3. The Court erred in refusing to grant the injunction as prayed for in the complaint.
4. The Court erred in allowing the defendant to challenge the validity of the Regulation in this proceeding. (Paragraph 9 of defendant's answer, R. 58, 59. Findings 18, 21, 22, 23 R. 77-78.)
5. The Court erred in holding that the defendant was relieved from complying with the Act and Regu-

lation because it had operated its business on a cost basis and not on a permanent inventory basis, and that the institution of the inventory basis would be so expensive as to drive the defendant out of business (Finding 23, R. 78-79).

6. The Court erred in holding that if defendant were compelled to furnish in its base period statement and cost-of-living commodity statement all of the information required by the Regulation, the defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system which would cost at least \$2,000 and require the defendant to employ two additional bookkeepers and compel the defendant to close its place of business because of the additional expense (Finding 23, R. 78-79).

7. The Court erred in holding that if defendant were compelled to adopt a new system of marking sales slips of merchandise and keeping records of the quality, grades, colors, etc., of merchandise, it would operate to compel changes in its business practices, cost practices and methods contrary to law (Finding 22, R. 78).

8. The Court erred in holding that on or about February 1, 1943, defendant prepared a base period statement, on the basis of all available information and records, showing the highest prices which it charged for such of those commodities as it delivered during March, 1942, its offering price for delivery of such commodities during such month, together with an appropriate description and identification of such

commodities in so far as defendant was able to do so (Finding 15, R. 75-76).

9. The Court erred in holding that in January 1943, prior to preparing its base period statement and its cost-of-living commodity statement, Eugene Sanden, manager of the defendant company, had an understanding with certain officials of the Office of Price Administration that it would be all right for the defendant to prepare said statement by taking the merchandise that was in defendant's store at that time, and pursuant to that understanding the defendant endeavored to list all the merchandise in said store, and did so to the best of its ability (Finding 17, R. 76-77).

10. The Court erred in holding that the defendant was entitled to rely upon the advice alleged to have been orally given him by a subordinate of the Office of Price Administration respecting the preparation of base period statements which information was directly contrary to that declared by the Act, Regulation and written instructions issued by the Office of Price Administration (Finding 17, R. 76).

11. The Court erred in holding that the base period statement and the cost-of-living commodity statement were carefully made by the defendant in an honest effort to meet the requirements of the Regulation (Finding 24, R. 79).

12. The Court erred in holding that the defendant had at all times displayed its ceiling prices for all cost-of-living commodities carried in its store on or near the merchandise and especially visible to customers (Finding 40, R. 93).

13. The Court erred in finding that at no time did the defendant mark up any price on merchandise contained in its store in March 1942 (Finding 26, R. 79).

14. The Court erred in holding that in March 1942, defendant made six sales of gingham, a yard goods, three at 35¢ per yard, and three at 29¢ per yard “but, it is not shown that these were the only sales of gingham made by the defendant in that month” (Finding 27, R. 80).

15. The Court erred in holding that in March 1942, defendant made two sales of denim, one at 29¢ per yard and the other at 39¢ per yard “but it is not shown that these were the only sales of denim made by the defendant in that month” (Finding 28, R. 81-82).

16. The Court erred in holding that in March 1942, defendant made four sales of gabardine, three at 39¢ per yard and one at 85¢ per yard, “but it is not shown that these were the only sales of gabardine made by defendant during March 1942” (Finding 36, R. 89).

17. The Court erred in holding that burlap is not listed in the cost-of-living commodity statement (Finding 32, R. 86).

18. The Court erred in holding that it was not shown in what year the sateen referred to in Plaintiff's Exhibit No. 24 was sold. (Finding 39, R. 92-93.)

19. The Court erred in holding that the defendant has at all times endeavored in good faith to comply with and abide by the provisions of the Act and the Regulations, including the General Maximum Price Regulation and all other Regulations supplemental

thereto, and intends to and will continue to do so in the future (Finding 41, R. 93).

20. The Court erred in holding that the defendant never engaged in, nor is about to engage in any act or practice contrary to the provisions of the Act and Regulation (Finding 42, R. 94).

21. The Court erred in finding generally each and all of the facts at issue herein in favor of the defendant and against the plaintiff, the Price Administrator (Finding 43, R. 94).

22. The Court erred in denying the motion of appellant to strike certain portions of defendant's answer contained in paragraphs IX and XII thereof. (See, Motion to Strike R. 61-64).

23. The Court erred in entering a final judgment of dismissal of the action and the cause of action.

24. The Court erred in entering a final judgment denying to appellant any of the relief prayed for in his complaint and dismissing plaintiff's action.

25. The Court erred in refusing and failing to enter judgment in favor of appellant and against defendant and in failing to grant relief as prayed for in his complaint.

SUMMARY OF ARGUMENT

I

Defendant's objections addressed to the validity of the Act are without merit; those directed to the General Maximum Price Regulations are barred from judicial consideration in this proceeding by the exclusive jurisdiction provisions contained in Section 204 (d) of the Act.

The Supreme Court has ruled that there is no merit to the contention that the Act unlawfully delegates legislative power to the Administrator in allowing him to issue regulations requiring certain records to be kept, posted, and filed. Individual financial injury sustained as a result of such compliance does not for that reason operate as a violation of the constitutional guarantee against uncompensated takings. Any such loss is merely "consequential" resulting from regulatory legislation of general applicability during an emergency war period.

Section 204 (d) is the keystone of the statutory plan for exclusive administrative and judicial review of price regulations. This plan insures the continuity of price control pending completion of statutory review. It provides protection to the public against the rapid and pervasive effects of sporadic and uneven inflationary control. It aids in simplifying enforcement and in making possible flexibility of administration. Section 204 (d) operates to bar in the present proceeding defendant's contention that if it is compelled to comply with the Regulation it would be deprived of property without due process of law. The Supreme Court has so held. Since defendant has failed to employ and exhaust the administrative remedies which are still available, it may not raise the question of or challenge the validity of the Regulations in this court.

II

By refusing to suspend defendant's license or to issue an injunction restraining further violations, the

District Court has condoned defendant's unlawful conduct and encouraged the defendant to continue to flout the Act and Regulation. The District Court was plainly in error in holding that an alleged increase in the cost of conducting defendant's business excused its compliance with the Act. The defendant's consistent defiance and disregard of the Act and Regulation, its vigorous opposition and continued resistance to regulations justified the suspension of its license or at the very least, fully warranted an injunction against further violations.

POINT I

Defendant's objections addressed to the validity of the Act and the Regulation are either without merit or are barred by Section 204 (d) of the Act

In the court below the defendant advanced various arguments assailing the constitutionality of the Act and Regulation. We concede that in an enforcement suit the constitutionality of the *Act* as distinguished from the constitutionality of the *Regulation* is open to attack. We will discuss defendant's arguments in the order in which they have been raised.

I. The first contention was that the requirements of the Administrator and the Regulations are in violation of the Fifth Amendment in that "they would deprive the defendant of liberty and property without due process because they would cause it to close its business due to excessive expense." A finding to that effect was made by the Trial Court (Finding of Fact No. 23, R. 78-79).

After the decision of the court below was rendered, the Supreme Court decided the cases of *Bowles v. Willingham*, 321 U. S. 503, and *Yakus v. United States*, 321 U. S. 414. These decisions completely dispose of the objection that the Act is unconstitutional because persons subject to it may suffer economic loss if compelled to comply with the Act, or because their property may depreciate in value as a consequence of regulation. The court said in the *Willingham* case:

A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. *L'Hote v. New Orleans*, 177 U. S. 587, 598; *Welch v. Swasey*, 214 U. S. 91; *Hebe Co. v. Shaw*, 248 U. S. 297; *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 157; *Euclid v. Ambler Realty Co.*, 272 U. S. 365; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Hamilton v. Kentucky Distilleries Co.*, *supra*; *United States v. Darby*, 312 U. S. 100. * * *

* * * * *

A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property. * * *

The argument that compliance with the Act and Regulation will require an expenditure of \$2,000, or such other amount as may tend to make it unprofitable for the defendant to continue to operate, or to compel it to operate at a loss, is no different than the argument advanced in *Yakus v. United States*, supra. There the defendants were indicted for violating a regulation fixing maximum prices for meats. At the trial they offered to prove that the prices fixed by the Regulation were so low that, no matter how efficient, they could not conduct their business other than at a loss and therefore the effect of the Act and Regulation was to deprive them of property without due process of law. The trial court there excluded the proffered evidence. This ruling was affirmed by the Circuit Court of Appeals for the First Circuit and in turn by the Supreme Court, on the ground that the evidence tended to indicate that the regulation was invalid or otherwise unfair or inequitable, which was a matter reserved exclusively for the Emergency Court of Appeals under section 204 (d) of the Act. This court also has reached a similar conclusion (*Taylor v. United States*, 142 F. (2d) 808, 817 (C. C. A. 9th, 1944); *Rosenweig v. United States*, 144 F. (2d) 30 (C. C. A. 9th, 1944), cert. den. Nov. 6, 1944).

Here, too, the trial court was bound to accept the Regulation as valid and should have declined to consider whether or not compliance would be too costly or that the Administrator was acting arbitrarily in demanding that the defendant comply. Instead of obeying the statutory mandate, the court substituted its own motions of fairness for those of the Adminis-

trator to whom Congress had entrusted the administration of the Act. The court concluded that the Administrator "must temper the rules" so that the individual "may operate within his income and with the help he can get." The court went on to say "we still live in America, the Constitution still goes" (R. 207-208). Far from being the "Constitutional Way" which had been approved by Congress, the court condoned a course of conduct which ran directly counter to the constitutional procedure set up by Congress. Price fixing, and a regulation designed to effectuate that purpose is not improper or invalid because it is set up on a "class rather than individual basis" (*Bowles v. Willingham, supra*).

If the requirements of the regulation were too drastic, adequate provision was made in the Act and Regulation whereby the defendant could obtain adjustment (Sections 203, 204). If the administrator declined to grant an adjustment, the defendant could obtain all the relief to which it was entitled, even to the extent of compelling the Administrator to grant it an adjustment, by availing itself of the remedies provided by sections 203 and 204 of the Act. (*Yakus v. United States, supra*; Cf. *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, where the protestants successfully indicated their right to an exemption from regulation). This procedure is still available to the defendant.² Having failed to exhaust its administrative remedies,

² Under Section 106 the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) an application for an adjustment may be made at any time after the issuance of a regulation or at any time after the effective date thereof. (Section 203 (a) as amended.)

the defendant's contention that the Regulation is invalid, or that the Administrator acted arbitrarily in attempting to compel defendant to comply with "expensive" record keeping and other requirements, cannot be raised here. (*Yakus v. United States, supra*; *Myers v. Bethlehem Co.*, 303 U. S. 41, 51; *La Verne Co-Op Citrus Ass'n v. United States*, 143 F. (2d) 415 (C. C. A. 9th, 1944).

2. The second contention of the defendant is that the requirements of the Administrator and regulations are in violation of the Act, in that they would force the defendant "to make disastrous changes in its business practices, cost practices, and methods which have been established for many years, thus causing the defendant to lose its business and so said requirements are in violation of the Fifth Amendment to the Constitution." (R. 59, 78-79).

The court below thought that compelling compliance in this case would operate to compel changes in defendant's business practices, cost practices and methods contrary to Section 2 (h) of the Act (Finding of Fact No. 22, R. 78).

This objection constitutes an attack upon the validity of the provisions of the regulations compelling defendant to keep adequate books and records from which the Government can determine whether there has been adherence to the Act and Regulations. This objection was beyond the jurisdiction of the District Court to consider. *Yakus v. United States, supra*. Consequently, for the purposes of this case, the Regulation must be accepted as valid.

In *Bowles v. NuWay Laundry*, 144 F. (2d) 721 (C. C. A. 19th, 1944) it was aptly said on a similar point (p. 748):

If the hardship recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere, in the Act (Sections 203 (a) and 204 (a) (b) (c) (d) and *not in the trial court.* [*Italics added.*]

In *United States v. Pepper Bros.* 142 F. (2d) 340 (C. C. A. 3rd, 1944), the court had occasion to refer to a variety of situations in which a challenge of a particular regulation was deemed to be within the exclusive jurisdiction of the Emergency Court, and in the course of doing so considered the very argument made by the defendant in this case.

The Court said: (p. 343)

Thus the question may arise as to whether a regulation operates "to compel changes in the business practices, cost practices or methods, or means or aids to distribution established in any industry, except to prevent circumvention or evasion of any regulation," in violation of the express prohibition of Section 2 (h). * * *

* * * * *

But such questions are clearly within the jurisdiction of the Emergency Court of Appeals. See *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474.

In *Henderson v. Burd*, 133 F. (2d) 515 (C. C. A. 2nd, 1943) the court dealt with a similar contention as follows:

The contention that Schedule 95, as construed by the court, compels changes in business practices established in the industry contrary to section 2 (h) of the Act, 50 U. S. C. #902 (h) is an attack upon the validity of the regulation, of which the Emergency Court of Appeals established by Section 204, 55 U. S. C. 924, has exclusive jurisdiction.

3. The third constitutional objection urged is that if "defendant is compelled to change its business practices and methods, said Administrator is legislating in violation of Article 1, paragraph 1 of the Constitution."

The issue as of whether Congress has unlawfully delegated its authority to the Administrator also was raised, carefully considered and answered in the negative by the Supreme Court in the *Yakus* and *Willingham* cases, *supra*. As the court said in the *Willingham* decision,

Thus, so far as delegation of authority is concerned, the rent control provisions of the Act, like the price control provisions (*Yakus v. United States, supra*), meet the requirements which this Court has previously held to be adequate for peacetime legislation.

The Constitution is not to be interpreted as demanding the impossible or the impracticable. (*Opp. Cotton Mills v. Administrator*, 312 U. S. 126, 145.) Within generous boundaries, Congress may create the policy and leave the implementation and execution to the Administrator. The instant Regulation (General Maximum Price Regulation, Section 1499.11 and 1499.13 (b)) requiring records to be kept, posted

and filed are safely within the prescribed limits. Record keeping requirements are the heart and foundation of effective price control. In no other way could the Administrator detect evasion; by no other method could a dealer properly determine his ceiling price; in no other manner could a purchaser know whether a ceiling price was exceeded. In issuing this Regulation, the Administrator was only obeying the will of Congress as expressed in Section 2 (9) of the Act. This section authorizes the Administrator to include in the regulation or order, such provisions as "he deems necessary to prevent the circumvention or evasion thereof." The fact that there is a zone for the Administrator's discretion in determining what measure of information should be provided and how it should be kept and posted for the proper protection of the public and for the effective enforcement of the Act, is not fatal to the power, but merely allows for a sensible and flexible exercise of it. (cf. *Yakus v. United States*; *Bowles v. Willingham*, *supra*).

POINT II

The trial court's findings should be set aside since they are contrary to the uncontradicted evidence

Substantially all of the violations recited in the statement of the case (p. 9-11, *supra*) were uncontradicted. The defendant conceded that violations occurred, but sought to be excused from their consequences because of lack of help, and its own method of keeping books. Nevertheless, in the face of defendant's own admissions, the Court found that the "defendant had never engaged in nor is about to be

engaged in any act or practice contrary to the provisions of the Act or of the regulations" (Finding of Fact No. 42, R. 94). It is well established that findings which run counter to undisputed facts may be set aside, and the appellate court, upon review, may draw its own inferences and conclusions from such facts (*Equitable Life Assur. Soc. v. Irelan*, 123 F. (2d) 462, 464 (C. C. A. 9th, 1941); *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F. (2d) 704, 705, 706 (C. C. A. 3d 1941); *United States v. South Georgia Ry. Co.*, 107 F. (2d) 3 (C. C. A. 5th 1939); *United States v. Mitchell*, 104 F. (2d) 343, 346 (C. C. A. 8th 1939).

In view of the court's findings, we are compelled to take up these violations in detail and discuss them in order:

(1) *Neither the base period statement nor the cost-of living commodity statement was filed until February 1943, more than seven months late.*—Under Sections 1499.11 (b) and 1499.13 (b) of the Regulation, as amended, defendant was required to prepare a base period statement and to file a cost-of-living commodity statement with the local War Price and Rationing Board on or before July 1, 1942 (Finding 12, R. 73-75).

The base period statement is a report showing the highest prices which the retailer charged for all of the kinds and qualities of commodities that come under the regulation and which he sold and delivered in March 1942. If he made no sales of a particular commodity during that month, but offered it for sale, then his highest offering price was to be listed. Each com-

modity must be appropriately described or identified (R. 73).

The cost-of-living commodity statement, on the other hand, shows the maximum price for each cost-of-living commodity sold or offered for sale by a retailer at the time the statement was filed, with an appropriate description or identification of each such commodity (R. 74). This statement was required to be filed on or before July 1, 1942, with the same board and was required to be kept up to date by the filing of monthly supplements thereto (R. 75).

Admittedly, on the testimony of Eugene S. Sanden, defendant's Manager, the base period statement was not prepared nor was the cost-of-living commodity statement filed until February 1943, approximately seven or eight months late. The Court below so found (R. 109, Finding 19, R. 77).

Defendant attributed its failure to prepare and file these statements to lack of help in the store. Even if that were a valid excuse, which it is not, the facts in this case utterly failed to support it (R. 107). It was shown that the defendant formerly operated with about 20 employees (R. 226). One employee was lost to the defendant in March 1942, and another in September of the same year (R. 200). It was claimed that other employees were lost thereafter, but the testimony did not show when. In other words, at the time that the two statements were required to be prepared, viz., July 1, 1942, the defendant had lost merely one employee. If the statements had been prepared in time, even under the defendant's method of operation and loose, unorthodox manner of keeping its books, the

task of preparing the statements would not have been costly or difficult. On the contrary, the testimony was that the cost of producing the base period list in a store doing approximately a half million dollars business per year, in May and early June 1942, was the "employee's time of one day, which would amount to about \$90" (R. 195). This testimony certainly lent no support to defendant's theory that the time required to comply with the Regulation was inordinate or that the cost was disproportionate to a citizen's obligations to his country in wartime. Naturally, as time lapsed, in view of defendant's incomplete records, it became more difficult to properly prepare the statements. Defendant, however, *cannot claim any advantage from its own delay or its own neglect*. Moreover, upon analysis of the testimony in this regard, it will be apparent that this excuse has no merit whatever.

Upon direct examination, Sanden testified that in March 1942, one of the employees went into defense work in California; that later, in September, his principal man in the store was called into the Army and left him without any help whatever in the Men's Department; that the head girl in the Notions Department went into the WACs; that her assistant took an office job; that the assistant drygoods lady went to the coast and the assistant office girl "went and took a man's place at one of the banks" (R. 200-201).

Upon cross-examination Mr. Sanden testified that defendant had an average of 20 employees; that during the year 1942 it had an average of 20, and likewise that number in 1941 (R. 226). He claimed that

all through 1943 it had from four to five people less. When questioned as to whether it was not a fact that defendant had 24 employees in January 1943, he admitted that such may have been the fact, but that they had been hired for the Holiday Season (R. 226). What these additional employees were doing after the Holiday Season in January he did not explain. He disclaimed any knowledge as to the exact number of employees in February 1943, when asked whether he did not have 24 employees working for him at that time (R. 227). He had it within his power to refer to his books and to refresh his recollection on that score. Why did he not do so? His silence is a sufficient answer.

The burden of providing an adequate excuse for not complying with the Regulation was clearly upon the defendant. It never met that burden. While, as indicated above, one employee was lost in March and another in September 1942, no definite dates were given as to when the others left, nor was it shown how important the lost employees were. It appears that replacements must have been made of those who did leave because the defendant maintained a staff of an average of at least 20 employees throughout 1942. In any event the alleged disadvantage of shortage of help under which defendant labored, even if it be true, was not limited to it. Almost all businessmen have had to cope with similar problems in this emergency period. Shortage of help is a common cry in wartimes but price control cannot wait on it forever, if inflation is to be prevented. We submit that a period of eight months' grace was far more than ade-

quate indulgence within which defendant could have fully complied with the Act and regulation if it exercised just a bit more than mere honorable intentions, and a little less of its "business-as-usual" tactics.

(2) *The defendant also failed to file current monthly supplements of cost-of-living commodity statements.*—Not only did the defendant file its cost-of-living commodity statements about eight months late, but it also failed to file current monthly supplements of such statements, which were likewise required by the Regulation.

The testimony showed a purchase invoice from Butler Brothers dated February 2, 1943, of a shipment of gingham, spun rayon, and gabardine yard goods to defendant (Pltf's Exh. 25, R. 164); a purchase invoice from Yale Fabrics Corp'n dated March 3, 1943, for a shipment of rayon jersey to defendant (Pltf's Exh. 26, R. 166). The gingham is described as lot No. 7318; the gabardine as lot No. 4165 and the spun rayon as lot No. 4175. The jersey did not have a lot number (R. 167-168). The gingham, spun rayon and gabardine were received by defendant several days after February 2, 1943. The rayon jersey was received about March 19, 1943 (answers to interrogatories numbered 8 and 9, Pltf's Exh. No. 27, R. 171). All of these yard goods were placed on sale within several days after their receipt (R. 183-184).

The only gingham yard goods appearing on the cost-of-living commodity statement was purchased from Carsons. No lot number is given to it (R. 116). The only gabardine appearing on such statement was

purchased from Belding. No lot number is given it (R. 147). Jersey and spun rayon were not even listed on the statement at all (R. 149, 144).

To summarize: All of the afore-mentioned yard goods were cost-of-living commodities. The gingham and gabardine were undoubtedly of a different kind and quality from those previously sold by defendant, since the ones described in the statement were from Carsons and Belding. Inasmuch as neither the spun rayon nor jersey were listed in the statement, it cannot be definitely determined whether defendant handled the same makes and qualities before. If it did, they should have been listed in the original cost-of-living commodity statement. If the items were new items they were required to be listed in a supplement thereto. In either event, there was a violation of the Act and Regulation.

Defendant did not deny these violations but sought refuge in the same excuse upon which it had relied in failing to file the original cost of living commodity statement namely, that the number of employees available did not allow adequate time for preparation. Our observations on defendant's utter disregard of the Act and Regulation in failing to file its original cost-of-living statement find further confirmation in defendant's neglect in filing these supplemental cost-of-living commodity statements.

(3) *The defendant either falsified the prices listed in the two statements, or omitted to list in the base period statement the kinds and qualities that were sold at prices appearing in its March 1942 sales*

slips.—When the defendant finally filed its base period statement, referring to prices of commodities as of March 1942, and cost-of-living commodity statement referring to prices of commodities as of February 1943, it was found that the prices in the base period statement and the cost-of-living commodity statement were *exactly alike*. It will be remembered that defendant claimed it had no books or inventory records from which the prices of its various fabrics and commodities could be determined. The sole method by which the Administrator could check the truthfulness of defendant's statements, therefore, was to refer to the sales checks, retained by the defendant, of sales made by it in March 1942. Upon comparison, these sales checks showed a price in almost each instance less than the prices shown in both the base and cost-of-living commodity statements (See pp. 34-46, *infra*).

There might possibly be some excuse for this disparity if the defendant had handled different commodities in March 1942 (as shown by the sales slips) than it listed in the base period statement and cost-of-living commodity statement. But the contrary was the fact. Sanden testified that in March 1942, the defendant handled the same makes, kinds and qualities of commodities as it did in 1943, with probably a few additional ones handled in 1943 (R. 113). How, then, can the explanation for the amounts in the sales slips be reconciled with the amounts stated in the base and cost-of-living commodity statements? We prefer to believe that defendant did not deliberately falsify its records. If it did not, then at least

there is no way to avoid the conclusion that the defendant failed, and neglected to include the less expensive kinds, qualities, and widths of its commodities in its base period statement, in violation of Section 1499.11 of the Regulation. If, on the other hand, the brands, qualities, prices, and sizes of commodities were accurately and correctly stated in the statements, then the testimony which Sanden gave that the brands and qualities were the same as those in March 1942, and also the statement made in the base and cost-of-living commodity statement to that effect, were untrue.

Obviously both accounts of what transpired cannot be true. In either event, whether this Court accepts one story or the other, there was a violation.

We point to still another possible violation in this regard. It is agreed that if a merchant handled the same commodities when a cost-of-living commodity statement was filed, as he did in March 1942, then the base and commodity statements would be the same. However, if he changed the brand or quality of commodities after March 1942, he was required to price such different commodities under one of the methods outlined in the regulation. If the commodity was similar to one handled in March, then he was to take the price of the similar commodity. If he handled a dissimilar commodity in March 1942, he was required to take the price of his most closely competitive seller of the same class for (1) the same commodity, or (2) if the competitor did not handle the same commodity, then for a similar commodity (Section 1499.1 (R. 71)). If a seller was unable to arrive at

a maximum price under one of the aforementioned methods, he was required to determine his price by a formula set forth in Section 1499.2 and to report such price to the Office of Price Administration (R. 71-72). To enable a merchant to conform with the Regulation, Section 1499.12 required each seller to keep records showing as precisely as possible the basis upon which he determined his maximum prices for commodities sold after the effective date of regulation (R. 73-74). Defendant also failed to comply with the law in this respect.

It thus clearly appears that there was no basis for Finding of Fact #24 that the base period statement and cost-of-living commodity statement were "carefully made by the Defendant in an honest attempt to meet the requirements of said General Maximum Price Regulation" (R. 24). There was certainly no care taken whatever, and the only evidence of an "honest attempt" to meet the requirements is to be found not from defendant's conduct but from his words. Obviously, these were not enough.

(4) *The defendant sold many commodities, such as Gingham, Denim, Challis, etc., at prices in excess of ceiling.*—It will be noted from what follows that in every department investigated, violations were found. We shall now discuss the specific violations in each department:

A. *Gingham, Yard Goods (Prg. XIII, d (1), d (2), d (3) of Complaint R. 11-12).*—The testimony showed that there were 6 sales made of Gingham in March of 1942, three at 35¢ per yard and three at 29¢ per

yard (R. 135). For three sales in February 1943 the price was 39¢ per yd., and in March 1943 the selling price was 39¢ per yd. (Pltf.'s Exh. 5 and 6, consisting of sales slips, R. 138, 140).

Only one item of Gingham was listed on the base period and cost-of-living commodity statement, described as follows (R. 139):

Article: Gingham. Style No.: Golden Rod. Mfgr.: Carsons. Max. Price: \$0.39.

It was shown that the selling price of Gingham in 1943 was 39¢ per yd. (R. 128).

To summarize: The sales slips disclose that 35¢ per yd. was the highest price at which Gingham sold in March 1942. Other sales were made at 29¢ per yd. The only Gingham listed in the two statements had a maximum price of 39¢ per yd. Thus defendant was in violation:

(a) for failing to list the kind and quality of Gingham that sold at 35¢ per yd. in its base period statement;

(b) for listing Carsons' Golden Rod Gingham in its statements as having a maximum price of 39¢ per yd., when the maximum price should have been 35¢ per yd.;

(c) for having sold and offered for sale Gingham in February and March 1943, at 39¢ per yd.

B. Denim, Yard Goods (Prg. XIII, e (1), e (2), e (3) of Complaint R. 13-14).—The testimony shows that two sales of Denim were made in March 1942, one at 39¢ per yd. and the other at 29¢ per yd. (Pltf.'s Ex. #7, consisting of 2 sales slips, R. 141).

Only two items of Denim were listed on the base-period and cost-of-living commodity statements, described as follows (Tr. of p. 35, L. 11-25):

Article	Style lot	Manufacturer	Description	Maximum price
Denim.....	5028.....	Schenck.....	Colored.....	\$0.45
Denim.....	Overall.....	Butler.....	Blue.....	.35

It was shown that 6 sales of Denim were made in February 1943, at 29¢, 35¢, and 45¢ per yd. (Pltf.'s Exh. 8, consisting of 6 sales slips, R. 142).

The selling price of Denim in March, 1943, was: Colored Denim, 45¢ per yd.; Blue Overall Denim, 35¢ per yd. (R. 129).

To summarize: The sales slips disclose that 39¢ per yd. was the highest price at which Denim sold in March 1942. One other sale was made at 29¢ per yd. Only 2 Denims were listed in the two statements, one Colored Denim having a maximum price of 45¢ per yd., the other Blue Overall Denim having a maximum price of 35¢ per yd. The defendant was in violation;

1. In having failed to list in its base period statement the kind and quality of Denim that sold in March 1942, at 39¢ per yd.

2. In having listed Colored Denim purchased from Schenck in its base period statement and cost-of-living commodity statement as having a maximum price of 45¢ per yd., where the maximum price should have been 39¢ per yd.

3. In selling and offering to sell in February and March 1943, Denim at 45¢ per yd., when the allowable maximum price was 39¢ per yd.

(c) *Challis, a yard goods* (*Par. XIII, f (1), f (2), and f (3) of Complaint*, R. 13-14).—The testimony showed that the one sale of challis was made in March 1942 at 25¢ a yard (Pltf's Exh. No. 9, R. 143).

Only one item of challis was listed on the base period and cost-of-living commodity statement and was described as follows (R. 144):

Article: Challis. Style Lot: 5904. Manuf.: CPS. Description: Figured. Maximum price: 32¢.

The selling price of challis in March 1943 was 32¢ per yard (R. 129).

To summarize: The sales slips disclosed that 25¢ per yard was the highest price at which challis sold in March 1942. The only challis listed in the two statements had a maximum price of 32¢ per yard. Defendant was in violation:

(1) in having failed to list in its base period statement the kind and quality of challis that sold in March 1942 at 25¢ per yard;

(2) in having listed figured challis lot No. 5904 in its two statements as having a maximum price of 32¢ per yard when the maximum price should have been 25¢ per yard; and

(3) In offering to sell challis in March 1943 at 32¢ per yard, as well as in having sold challis at 32¢ per yard in March 1943, whereas the ceiling price was 25¢ per yard.

(d) *Gabardine, a yard goods* (*par. XIII, i (1), i (2) and i (3) of Complaint, R. 17-18*).—The testimony disclosed that, in March 1942, four sales of gabardine were made, three at 39¢ per yard and one at 85¢ per yard (Pltf's Exh. 13, R. 146).

Only two items of gabardine were listed on the base period and cost-of-living commodity statements described as follows (R. 147):

Article	Style lot	Manufactures	Description	Maximum price
Rayon Goods.....	Gabardine.....	Belding.....	Plain.....	\$0.89
Rayon Goods.....	Gabardine.....	Belding.....	Plain.....	1.19

It was shown that ten sales of gabardine were made in February 1943, seven sales at \$1.00 per yard and one at 1.39 per yard and two at 89¢ per yard (Pltf.'s Exh. 14, 146-147).

To summarize: The sales slips disclosed that 85¢ per yard was the highest price at which Gabardine sold in March 1942. Other sales were made at 39¢ per yard. The only gabardines listed in the two statements have a maximum price of 89¢ and 1.19 per yard. Defendant was in violation:

(1) in having failed to list in its base period statement the kind and quality of gabardine sold in March 1942 at 85¢ per yard;

(2) If defendant handled in March 1942 only the two kinds of gabardine listed in the base period statement, then defendant misstated the maximum price of one, since one of the two kinds listed should have a maximum price of 85¢ per yard; and

(3) In having sold gabardine in February 1943 at 1.39 per yard in excess of even the highest price listed by defendant in its two statements.

(e) *Indian Head*.—*A yard goods (Par. XIII, 1, (1), 1 (2) and 1 (3) of the Complaint (R. 19-20).*—The testimony disclosed that in March 1942, six sales of Indian Head were made, three at 35¢ per yard, one at 39¢ per yard, one at 40¢ per yard, and one at 42¢ per yard. (Pltf's. Exh. 17, R. 150.) Only two items of Indian Head were listed on the base period and cost-of-living commodities' statements, described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
Indian H.....	Butlers.....	White 44.....	<i>Per yard</i> \$0.49
Indian H.....	Butlers.....	White 54.....	.59

It was shown that six sales of Indian Head were made in February, 1943, four sales being made at 50¢ per yard and two at 59¢ per yard (Pltf's. Exh. 18, R. 129, 150).

To summarize: The sales slips disclosed that 42¢ per yard was the highest price at which Indian Head sold in March, 1942, other sales were made at 35¢, 39¢, and 40¢ per yard. The items listed in the two statements had a maximum price of 49¢, 50¢, and 59¢ per yard. No kinds of Indian Head having maximum prices in the amounts at which sales were made in March 1942 appear in the two statements. Defendant was in violation:

(1) In having failed to list in its base period statement a kind and quality of Indian Head that sold in March 1942 at 42¢ per yard; and

(2) If defendant handled in March 1942 only the three kinds of Indian Head listed in the base period statement, then defendant has misstated maximum price of at least one kind, since one of the three kinds should have a maximum price of 42¢ per yard.

(f) *Percale, a yard goods.* (*Par. XIII, m(1), m(2), and m(3) of Complaint (R. 20-21)*).—The testimony disclosed that in March 1942, 19 sales of percale were made, one sale at 18¢ per yard and 18 others at 29¢ per yard (Pltf's. Exh. 19, R. 151-152).

Only one item of percale was listed on the base period and cost-of-living commodity statement described as follows (R. 153):

Article: Plain Percale. Style No.: Golden Star. Manufacturer: Rice Stix. Description: 80 sq. Maximum price: \$0.35 per yard.

It was shown that ten sales of percale were made during the month of February 1943 at prices in excess of 29¢ per yard (Pltf.'s Exh. 20, R. 152). When the investigator from the OPA inspected the store during March 1943, she saw a "T" stamp placed upon the percale display. On this T. stamp appeared the price "35¢" with a line marked through it and immediately below the T. price of "33¢" (R. 130).

To summarize: The sales slips disclosed that 29¢ per yard was the highest price at which percale sold in March, 1942. One other sale was made at 18¢ per yard. The only percale listed in the two statements

has a maximum price of 35¢ per yard. Defendant is in violation:

(1) In having failed to list in its base period statement the kind and quality of percale that sold in March, 1942 at 29¢ per yard;

(2) In listing Golden Rod percale purchased from Rice Stix in its two statements as having a maximum price of 35¢ per yard when the maximum price should have been 29¢ per yard; and

(3) In making ten sales of percale in February, 1943, at prices in excess of 29¢ per yard and in offering to sell in March, 1943, percale at 33¢ per yard.

(g) *Burlap, a yard goods.* (Par. XIII, p. (1), p. (2), and p. (3) of *Complaint* (R. 23-24)).—The testimony disclosed that in March, 1942 two sales were made of Burlap at a price of 29¢ per yard (Pltf.'s Exh. 22, R. 154). Only one item of Burlap was listed on the base period and cost-of-living commodities' statement described as follows (R. 154):

Article: Burlap. Style No. Manufacturer: Volker. Description: Plain. Maximum price: \$0.45.

It was shown that the selling price of Burlap, a yard goods, in March 1943 was 45¢ per yard. (R. 129.)

To summarize: The sales slips disclosed that 29¢ per yard is the highest price at which Burlap sold in March 1942. Defendant was in violation:

(1) In having failed to list in its base period statement the kind and quality of Burlap that sold in March 1942 at 29¢ per yard; and

(2) In listing the Burlap purchased from Volker in its two statements as having a maximum price of

45¢ per yard where the maximum price should have been 29¢ per yard.

(3) In offering Burlap for sale in March 1943 at 45¢ per yard.

(h) *Ticking, a yard goods (Par. XIII, r (1), r (2) and r (3) of Complaint, R. 24-25).*—The testimony disclosed that March 1942 six sales of ticking were made, one at 25¢ per yard, one at 35¢ per yard, and four at 50¢ per yard (Pltf's Exh. 21, R. 153). Only five items of ticking are listed in the base period and cost-of-living commodities' statements described as follows (R. 153-154):

Article	Style lot	Manufacturers	Description	Maximum price
Ticking.....	4388.....	Mitchell F.....	Colored.....	\$0.65
Ticking.....	Amoskeig.....	Butlers.....	Plain.....	.35
Ticking.....	4504.....	C. P. S.....	Plain.....	.69
Ticking.....	Short length.....	C. P. S.....	Figured.....	.65
Liberty Ticking.....	x5.....	C. P. S.....	Striped.....	.69

It was shown that in March 1943 defendant was selling four grades of ticking, one at 49¢ per yard, one at 65¢ per yard, and two at 69¢ per yard (R. 130).

To summarize: The sales slips disclosed that 50¢ per yard was the highest price at which ticking sold in March 1942. Other sales were made at 25¢ and 35¢ per yard. One item of ticking is listed in the two statements at 35¢ per yard which corresponds with one of the sales made in March 1942. However, there are no tickings listed in the statements at 25¢ per yard and 50¢ per yard. Defendant was in violation:

(1) In having failed to list in its base period statement a kind and quality of ticking that sold in March, 1942 at 50¢ per yard; and

(2) If defendant handled, in March 1942, only the five kinds of ticking listed in the base period statement, then defendant failed to correctly list the maximum price of one which should have a maximum price of 50¢ per yard.

(i) *Spun Rayon, a yard goods.* (Par. XIII, g (1), par. XIII (a) (b) of the Complaint, R. 15, 10).—The testimony disclosed that in March, 1942, two sales of spun rayon were made, one at 59¢ per yard and the other at 79¢ per yard (Pltf's Exh. 10, R. 144).

It was shown that spun rayon was neither listed in the cost-of-living commodities' statement (R. 144), nor in the base period statement (Pltf's Exh. 2). It was further shown that two sales of spun rayon were made in February 1943 at 89¢ per yard (Pltf's Exh. 11, R. 145). The inspector for the OPA testified that when she inspected the store in March 1943, defendant had a "T" stamp set on the spun rayon display. A card on the "T" stamp bore the writing "spun rayon, ceiling price 79¢". Inspection of the bolts of spun rayon revealed that the price 89¢ appeared on the ends thereof (R. 129).

To summarize: Defendant was in violation:

(1) In not listing spun rayon sold by it in March 1942 in its base period statement;

(2) In not listing spun rayon in its cost-of-living commodity statement or in a supplement thereto, despite the fact that it sold spun rayon in March 1943; and

(3) In selling spun rayon in February 1943 at 89¢ per yard when its highest price for that material in March, 1942, was 79¢ per yard.

(j) *Jersey, a yard goods* (Par. XIII, (a) (b) of the Complaint (R. 10-11)).—The testimony disclosed that in March 1942 five sales of jersey were made; one at 95¢ per yard, one at \$1.19 per yard, and three at \$1.65 per yard (Pltf's Exh. 15, R. 148).

It was shown that jersey was not listed in the two statements (R. 149). It was further shown that sixteen sales of jersey in defendant's store in February 1943 at two prices; rayon jersey in plain colors at \$1.65 per yard and in prints or patterns at \$1.69 per yard (R. 129) and that eleven sales were made at \$1.69 a yard (R. 149).

To summarize: Defendant was in violation:

(1) In failing to list jersey in its base period and cost-of-living commodity statements.

(2) In selling jersey at \$1.69 per yard in February 1943 where the highest price for jersey in March 1942 was \$1.65 per yard.

(k) *Overalls* (Par. XIII, r(1), r(2) of the Complaint (R. 24-25)).—The testimony showed that defendant made four sales of overalls in March 1943 at \$3.00 a pair (Pltf's Exh. 23, R. 155). The highest price listed for overalls in the cost-of-living commodity statement was \$2.50 (R. 155).

To summarize: Defendant has either sold overalls above the ceiling or has failed to list the \$3 overall in its cost-of-living commodity statement.

Eugene Sanden explained that the overalls were sold at \$3 per pair but were unintentionally left off

the list (R. 202). The court found that the failure to list this merchandise was an error or oversight and entirely without any intent to violate any provision of the Regulation. (Finding of Fact No. 25, R. 79).

(1) *Sateen* (Par. XIII, q (1), of the Complaint (R. 24).—The testimony showed that defendant made one sale of the Sateen at the price of 59¢ per yard in February 1943 (Pltf.'s Exh. 24, R. 156).

Only one item of sateen was listed on the two statements described as follows (R. 156):

Article: Sateen. Manufacturer: Robinson. Description: Colors. Maximum price: 45¢.

To Summarize: 1. No supplements were filed to the original cost-of-living commodity statement. We may assume that defendant was selling in February 1943 the sateen listed in the two statements and having a maximum price of 45¢ per yard. The February 2, 1943, sale at 59¢ per yard was therefore in excess of the price listed in the two statements.

2. If the sateen that sold at 59¢ per yard was of a different kind than that listed in the statements, then defendant is in violation in not having listed it in its cost-of-living commodity statement or in a supplement thereto.

(m) *Eyelette* (Par. XIII, h (1), h (2), and h (3) of the Complaint (R. 15-16)).—The testimony showed only one sale of eyelette was made in March 1942 at a price of 79¢ per yard (Pltf.'s Exh. 12, R. 145).

Only one yard of eyelette was listed in the two statements described as follows (R. 146):

Article: Eyelette. Manufacturer: Robinson. Description: White. Maximum price: \$1.00.

To summarize: The sales slips disclosed that the highest price at which eyelette sold in March 1942 was 79¢ per yard. The only item listed in the two statements has a maximum price of \$1.00 per yard. Defendant was in violation—

(1) in having failed to list in its base period statement the kind and quality of eyelette that sold in March 1942 at 79¢ per yard; and

(2) in listing eyelette purchased from Robinson in its two statements as having a maximum price of \$1.00 per yard when the maximum price should have been 79¢ per yard.

(n) *Canvas*.—The testimony showed that the defendant in March 1943 was selling a cotton canvas at 35¢ per yard (R. 139). An examination of the cost-of-living commodity statement will disclose that no cotton canvas yard goods is listed thereon.

(m) *Failure to Appropriately Describe or Identify Commodities in the Base and Cost of Living Commodity Statement*.—Under sections 1499.11 (b) and 1499.13 (b) each commodity listed in the base period and cost of living commodity statement was required to be appropriately described or identified (R. 73, 75).

Sanden testified that he received a copy of Bulletin No. 2 of the General Maximum Price Regulation from the Office of Price Administration prior to the time the two statements were prepared (Exh. No. 4, R. 123). This bulletin is entitled: "What Every Retailer Should Know About The General Maximum Price Regulation." Beginning at p. 33 there appears the following instruction:

6. How to Identify Merchandise.

The Regulation requires proper identification of merchandise in connection with

1. Display of ceiling prices on cost-of-living items,

2. Preparing the statement of base-period prices to be kept in the store, and

3. Preparing the list of maximum prices of cost-of-living commodities for filing with the local War Price and Rationing Board.

Since the best means of identification will differ among stores, or even for different items in the same store, the Office of Price Administration has not prescribed specific types of information which must be used for identification.

* * * The guiding rule in the case of the statement of maximum prices to be kept for examination by any person is that any item in the store must be readily traceable to an entry in the maximum price statement. Thus, the merchandise might be identified in the statement by the manufacturer's name or a code symbol for it, by the *manufacturer's or retailer's lot number or style number also shown* on the merchandise, by a brand or style name, by the grade label, *by the size (where size is a price factor)* or *by an adequate physical description*.

The retailer will be able to answer many of his own questions on identification if he visualizes the uses which will be made of his maximum price statements. For example, if a customer points to a specific item of merchandise in the store and asks to see the statement of its maximum price, the retailer should be able to satisfy

this request readily by showing the customer a specific entry in the statement. The customer would certainly not be satisfied by an entry reading "Dress—\$2.98" or "Cotton Towel—39 cents." It would be clear that some dresses may have a maximum price of \$1.98, and some towels a ceiling of 29 cents. The customer could be satisfied if the entry in the record read "Ladies Street Dress, manufacturer 26, Style H 198, ceiling price \$2.98" and if the dress tag itself contained corresponding identification.

This whole matter of proper identification is of course most important in terms of the retailer's relations to his customers. But it is also vital to his relations with O. P. A. *If requested by O. P. A., the retailer must be able not merely to associate the price on a specific item of merchandise in the store with a specific entry in his statement of base-period prices or his statement of maximum prices of cost-of-living items, but he must be able to go behind such statements to his invoices or other documents in order to provide fuller evidence as to how he arrived at maximum prices.*

With this guidance as to the use which will be made of these maximum price statements, the retailer should be able to adjust his own situation to fit the requirements. [Italics supplied.]

Reference to defendant's methods shows that it made little, if any, effort to provide identification as to size or physical description even though the price of the commodity was determined by those factors; and even though in the absence of such description it would be almost impossible to compare these prices

with those in his invoices or other documents. Thus, for example, on page 3 of the defendant's Cost-of-living Commodity Statement (Exh. No. 1) turkish towels are described as follows:

Article	Style No.	Manufacturer	Description	Maximum Price
Turkish Towels.....	C. P. S.....	Colored.....	\$0.35
Turkish Towels.....	C. P. S.....	Colored.....	.45
Turkish Towels.....	C. P. S.....	Colored.....	.59
Turkish Towels.....	C. P. S.....	Colored.....	.89
Turkish Towels.....	C. P. S.....	Colored.....	1.00
Turkish Towels.....	C. P. S.....	Colored.....	1.39
Turkish Towels.....	C. P. S.....	Colored.....	1.50
Turkish Towels.....	Butlers.....	Colored.....	.35
Turkish Towels.....	Butlers.....	Colored.....	.39

Sanden testified that the letters "C. P. S." means Carson-Pirie-Scott, who supplied the towels (R. 116). He said it was undoubtedly impossible to give any lot number because they may have been on the shelf without any lot number on them (R. 116). His testimony in part was as follows:

* * * You can get so many different sizes; you can get a very small size on up to a beach size three yards long and two yards wide, extra heavy. Those were identified to the best of my ability (R. 116).

Again, on page four of the statement (Exh. No. 1) appears the following:

Article	Style No.	Manufacturer	Description	Maximum price
Pique.....	Robinson.....	White.....	\$0.35
Pique.....	Robinson.....	White.....	.50
Cotton Damask.....	C. P. S.....	White.....	.95
Cotton Damask.....	C. P. S.....	White.....	.75
Cotton Damask.....	C. P. S.....	White.....	.89

Sanden testified that the above represented two qualities of muslin and each had a separate lot number (R. 117).

On page 10 of Exhibit No. 1, dish towels are described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
Br. Muslin.....	F. of L.....	Butlers.....	36	\$0. 22
Br. Muslin.....	F. of L.....	Butlers.....	36	. 19

Sanden testified that the above items represented two different qualities of pique and three different qualities of cotton damask (R. 116, 117).

Further on page 8 of the statement (Exh. No. 1) muslin is described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
Dish Towels.....	Kitchen Towels Co..	Colored.....	\$0. 25
Dish Towels.....	Kitchen Towels Co..	Colored.....	. 19

These towels likewise were of different qualities and had different lot numbers (R. 118).

Thus also men's mackinaws were described on page 17 as follows:

Articles	Style No.	Manufacturer 4	Description	Maximum price
Men's Mackinaws.....	.....	Shank house.....	Plaid.....	\$8. 95
Men's Mackinaws.....	.....	Shank house.....	Plaid.....	17. 95
Men's Mackinaws.....	.....	Shank house.....	Plaid.....	15. 95
Men's Mackinaws.....	.....	Shank house.....	Plaid.....	12. 50
Men's Mackinaws.....	.....	Shank house.....	Plaid.....	9. 50
Men's Mackinaws.....	Beaverette Brown.....	.....	Sheep Lined.....	5. 50
Men's Mackinaws.....	Beaverette Brown.....	.....	Sheep Lined.....	12. 95
Men's Mackinaws.....	Beaverette Brown.....	.....	Sheep Lined.....	22. 50

The foregoing constitute only some of the commodities that were not appropriately described or identified in the two statements. It is evident that if none of the above items could be identified in the store, then, of course, a commodity in the store could not be traced to the statement.

Sanden attempted to attribute the inadequate description to the fact that lot numbers could not be found. But this would not have prevented defendant from placing a distinguishing mark on the commodities, or describing them in some other way. Apparently the turkish towels could have been distinguished by size, and the other articles, likewise, could have carried a more specific physical description as was required by the Regulation, and as was indicated by the Bulletin.

The two statements, as explained by Bulletin No. 2, were intended to serve a definite purpose. The base period statement was subject to inspection by the purchasing public. It gave the purchaser an opportunity to determine whether he was being overcharged. The cost-of-living commodity statement was intended to reveal the allowable selling prices of such commodities. They also were intended to give the O. P. A. a means of checking to determine if ceiling prices were being violated.

If the descriptions in the statements are such that the commodities in the store cannot be traced to the statements, then obviously the statements are utterly worthless and might just as well have not been prepared at all.

(n) *Failure to Post Prices of Cost-of-Living Commodities.*—By Section 1499.13 (a) of the regulation, every retailer is required to mark the price of every cost-of-living commodity he offers for sale *in a manner plainly visible to, and understandable by the purchasing public.* The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale (R. 74).

Commencing on page 22 of Bulletin No. 2 (Exhibit No. 4), the retailer is informed as to how to post his ceiling prices. Whatever method of marking is used, ceiling prices must be displayed on or near the merchandise, easily visible to purchasers. The maximum price must be identified as “Ceiling Price” or “Our Ceiling,” and it must be plain to the customer to what merchandise the price refers (R. 75).

The guiding rule is: “Consumers should be able to see the ‘Ceiling price’ marker clearly when standing at the point of purchase without having to ask or look for it, and without having to thumb through pages.”

Dora Clark, inspector for the Office of Price Administration, testified that in March, 1943, when she inspected defendant's store to determine whether the ceiling prices of cost-of-living commodities were posted, she could find no prices posted for jersey, sharkskin, Indian Head, and ticking, all yard goods; for none of the bed spreads; for Wamsutta, Glengary

and Sonoma brand of bed sheets; and none for such commonly used merchandise as women's and girls' dresses; for women's skirts; for men's overalls; for children's hosiery; for children's gloves; and for the majority of men's work pants (R. 127, 128).

Miss Clark went from table to table through the store to determine whether the prices were posted and looked for the ceiling prices on the articles that were being offered for sale (R. 128). Although the ceiling prices were required to be posted in a manner plainly visible to, and understandable by the purchasing public, when Miss Clark inspected each of these items, none were marked with the maximum price (R. 127). She also inspected the entire store and was unable to find any posting or marking of the items in question.

Sanden at first denied that the ceiling prices of all commodities were not posted. Later, he admitted some may have been "overlooked." Relying on his old refrain, he attributed this omission to lack of help in the store (R. 215). Nevertheless, the court found that Defendant at all times displayed its ceiling prices * * * at or near the merchandise and easily visible to customers. (Finding of Fact No. 40, R. 93.)

(o) *Based on number of articles checked, the percentage of violation was 100%.*—Although Sanden attempted to create the impression that a 100% check was made of defendant's store; that the investigators were in his store for approximately three weeks; and that the percentage of error was "one percent or even one-half of one percent", this conclusion was sharply rebutted by the evidence.

Donald Creel, an inspector for the OPA, testified that the investigation ran from March 23 to March 31, 1943 (R. 229), and that he and Miss Clark, his assistant, were in defendant's store to talk to Mr. Sanden and to inspect some merchandise. The sales slips were examined at the Office of Price Administration in Helena. About March 31st, another trip was made to the store to return some sales slips. Creel also went to the store on May 15 (R. 161). He further testified that no attempt was made to make a survey or examination of all of the commodities sold by defendant, but that the investigation was concerned only with the items testified to on the trial (R. 162, 163). Based on the number of articles checked, the percentage of violation is about 100%.

**The court's rulings on the sale of yard goods at excess prices
and the failure to prepare the statements**

On almost each of the violations respecting sales of yard goods in excess of ceiling prices, the court ruled that the material sold in March 1942 was not of the same quality as that sold in February or March 1943 and therefore would not ordinarily sell in the same price line (Findings of Fact 27-31, 36, 37, 39). We do not know how the court could possibly arrive at this conclusion without having before it adequate description and identification of the various commodities sold in March 1942, and these the court declared were not available. Further, if these items were new items, they were required to be listed in the cost-of-living commodity statement or in the supplements thereto.

Why was there no compliance at least on this score? This was defendant's answer in part:

That refers to keeping that matter up to date, and, as I say, due to the fact that it was a question of keeping the doors open or a question of closing up and getting out the lists, I thought the best things to do would be to take the former course * * * *and then if I had a chance to get some of the stuff out, I would do so.* [Italics added.] (R. 214.)

Then again under Section 1499.2 of the Regulation, if a dealer is unable to price an article not previously handled, according to a similar commodity which he had handled, he must charge the highest prices of a most closely competitive seller. Yet when Sanden was asked whether he did not understand that he was to "shop" a competitor if he was unable to price the new article according to a similar commodity, his answer, quite typical of his defiant attitude throughout was:

I have never done it and I don't propose to do that. I am not going to shop competitors (R. 226).

Yet the Court found that the "defendant has at all times endeavored in good faith to comply with "each and all the rules and regulations" * * * (Finding of fact 41, R. 93).

The Court also offered no explanation why in some instances, like gabardine, the merchandise was sold or offered for sale at a price even in excess of that set forth in the cost-of-living commodity statement, or why in some instances, like canvas, the merchandise

was not listed in the cost-of-living commodity statement at all (see pp. 38-39, 46, *supra*).

With respect to the failure to properly list on the base period statement the kinds of material and their prices as of March 1942, the court found that Sanden conferred with Loren Anderson and Stephen T. McDermott, officials of the Office of Price Administration, and

they, then and there had the understanding that it would be all right for the defendants to prepare said statements by taking the merchandise that was in defendant's store * * * at that time, and pursuant to that understanding, the defendant endeavored to list all the merchandise in said store, and did to the best of his ability (Finding of Fact No. 17).

The record does not support this finding. Sanden testified (R. 202):

We went over, my sister and I, to see Mr. Anderson and Mr. McDermott, and it was *our* understanding at that time that it would be all right to prepare the list by taking the merchandise that was in the store at that time and listing it together with the merchandise and that would be a satisfactory statement to be listed, a basic price list and a cost of living commodity list. [Italics added.]

In referring to the word "our," Sandem undoubtedly intended to include only his sister and himself, and not also the OPA officials. This is confirmed by the fact that on direct examination Sandem testified that Anderson and McDermott had only told him "generally" what to do with regard to the two state-

ments in question and had given him a Bulletin of instructions (Plaintiffs Exhibit 4, (R. 122-123)). Sandem made no mention of such an "understanding," on direct examination. Moreover, McDermott's testimony squarely rebutted the "understanding."

The Court. What did you tell him?

A. We told him every item in his store must be included in his base-period list, reflecting the prices of those items as of March 1942 (R. 192).

It is significant that Sanders never denied ^{Mc Dermott's} Anderson's version of what happened. In any event, even if we assume there was such an "understanding" among *all* the parties, it would not be binding upon the Administrator, since the fundamental requirements of the Act and regulation, which are so abundantly clear in this respect, could not be modified or waived by a subordinate (*Nichols & Company v. Secretary of Agriculture*, 131 F. (2d) 651, 659 (C. C. A. 1st, 1942); *Securities and Exchange Commission v. Torr*, 22 F. Supp. 602, 612 (S. D. N. Y. 1938); *Fleming v. Miller*, 47 F. Supp. 1004, 1008 (D. C. Minn. 1942); *Bowles v. Jim Jung* (D. C. Cal. May 8, 1944). 2 Op. and Dec. 2035); *Nelson v. Secretary of Agriculture*, 133 F. (2d) 453 (C. C. A. 7th, 1943); *Bowles v. Sisk*, 144 F. (2d) 163 (C. C. A. 4th, 1944). In the last-mentioned case the court said (p. 165):

Nor do we see any reason why it [the Regulation] should not be enforced against the defendants, who fall clearly within the provisions. *The fact that certain officials of the Office of Price Administration may have*

thought it would not apply to them is, of course, no reason; and we find no equitable considerations which would justify the Court in refusing to enjoin defendants from its violations. [Italics added.]

Summary of Evidence

In short, the evidence showed that the defendant violated the clear and unambiguous terms of the Regulation in that:

(1) It made numerous sales at prices in excess of the legal maximum of a large variety of goods;

(2) It collected an undetermined amount of money more than it was legally entitled to;

(3) It filed its base and cost-of-living commodity statements about eight months late;

(4) It misstated the prices of commodities in its base period statement;

(5) It failed to file its supplementary commodity statements;

(6) It failed to include in the statements which were required to be filed with the appropriate War Price and Ration Board a large number of articles which should have been included thereon;

(7) It failed to describe with sufficient clarity many of the items scheduled on the statements which it did file; and

(8) It failed to properly post its ceiling prices.

From the foregoing, it must be evident that not only is there no basis for Finding of Fact No. 42 "that defendant had never engaged in any act or practice contrary to the provisions of the Act or of

the regulations," but on the contrary, there is almost conclusive evidence that defendant engaged in nearly every conceivable act and practice contrary to the Act and the Regulations.

POINT III

Defendant's license should have been suspended. In any event, an injunction should have been granted

1. On the basis of the large variety, number and persistence of violations recited above, it is submitted that a suspension of defendant's license to do business for some period, pursuant to Section 205 (f) (2) of the Act,³ would have been the most appropriate relief

³ Section 205 (f) (2). Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months.

in this case. It was said by the Senate Committee which reported the Emergency Price Control Act:

Rising prices and increases in the cost of living bring misery to our people, cause industrial unrest, and undermine our unity. Since prices do not advance at the same rate for all commodities, and living costs tend to rise more quickly than wages, the burdens of war are haphazardly distributed, with the heaviest burden on the farmer, the salaried worker, the small investor, the pensioner, and the veteran, whose incomes cannot readily be expanded.

Price control which cannot be made effective is at least as bad as no price control at all. It will not stop violation, and enables those who defy regulation to profit at the expense of the buyers and sellers who unselfishly cooperate in the interests of the Emergency (p. 2) (S. Rep. 931, 77th Cong., 2nd Sess. (1942), p. 2).

However, if a license suspension appeared to be a drastic remedy in the light of all the circumstances, then at the very minimum an injunction restraining further violation of the Act and Regulations should have been granted.

It is true that whether an injunction should issue in any case rests in the sound discretion of the court. But as the Supreme Court held in *The Hecht Company v. Bowles*, 321 U. S. 321, that discretion should be exercised in the light of the large objectives of the Emergency Price Control Act and should reflect an acute awareness of the admonition of Congress that "of all the consequences of war, except human slaughter, inflation is the most destructive and that delay or indifference may be fatal." Here,

however, the court exercised no discretion in withholding the injunction. Rather, it refused to grant the injunction because it found no violations, although they plainly existed. The court found no violations because of its strange notion that compliance with the Act and Regulation would be so costly as to be excused. The Supreme Court has held this to be thoroughly erroneous. (Cf. *Bowles v. Willingham*, supra). Apart from that, in determining whether an injunction should be granted, the court was without authority to consider the fairness of the regulation or its economic effect. These are matters which Congress has properly reserved for the exclusive consideration of the Emergency Court of Appeals (*Yakus v. United States*, supra, *Bowles v. NuWay Laundry Company*, supra.)

If the hardships recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act (Sections 203 (a) and 204 (a) (b) (c) (d), and not in the trial court. The complexities of the problem involved in such a gigantic undertaking renders judicial administration inadequate and inappropriate. In our judgment the public interest fully justified injunctive relief * * * (*Bowles v. NuWay Laundry Company*, supra, 141 F. (2d) at p. 748.)

The fairness of the regulation being a matter which the court was not entitled to consider, and the defendant having clearly violated the law and having sought to vindicate its right to do in the future what

it had done in the past, there are present in this case no equitable circumstances which would justify a court to withhold relief. Accordingly, the court erred in denying an injunction (*Bowles v. NuWay Laundry Company, supra*; *Bowles v. Simon*, 145 F. (2d) 334 (C. C. A. 7th, 1944).

2. The facts in this case are wholly distinguishable from those in the case of *Hecht Co. v. Bowles* (321 U. S. 321).

In the *Hecht Case*, the absolute good faith of the defendant was unquestioned. It made costly efforts to comply with the regulations. It corrected promptly and voluntarily all violations called to its attention. It set up a special price control office to prevent recurrence of mistakes. It proposed to make repayment of all overcharges to customers who could be identified and to contribute the remainder of the overcharges to local charity.

The defendant in this case, unlike the defendant in the *Hecht Case*, took no timely, positive, or vigorous methods to understand the requirements and to meet them. Errors and mistakes were not promptly corrected as soon as they were discovered, in fact, simply were not corrected. Good faith is scarcely apparent where a merchant under complaint reluctantly files base period and cost of living commodity statements eight months late, and then adds "insult to injury" by neglecting to file necessary supplementary statements. Commodities were sold or offered for sale at more than the ceiling price. No effort at all was made by the defendant to improve its record-keeping methods or to make its records

more adequate. Records were kept in such a way as to make it practically impossible to determine whether defendant was living up to the regulations. While defendant asserted its shortage of help as the main excuse for non-compliance, the Administrator offered proof to show that in January, 1943, defendant had more than its average quota of help, while defendant disclaimed knowledge of how many employees it had in February, 1943 (R. 226, 227). It was not for plaintiff to prove that defendant had adequate help (*Brown v. Mars*, 135 F. (2d) 850, 856 (C. C. A. 8th, 1943), cert. den. 320 U. S. 798 and cases cited). See also, *The Medea*, 179 Fed. 781, 786 (C. C. A. 9th, 1910). The fact is, as we have shown, defendant's staff was completely intact, except for one employee, until September 1942, but defendant did nothing during June, July, or August toward compliance with the law. No premium should now be placed on its own delay. No benefit should now be drawn from its own neglect.

In every way, therefore, past and present good intentions are wholly lacking here from which to assume that there is no likelihood of avoidable violations and no reason to apprehend them in the future. The defendant cannot and does not plead ignorance of the Act and Regulations. Its acting manager was an attorney who knew or could easily have acquainted himself with both (R. 225). While some individual ceiling price violations might be explained on the basis of lack of experienced help, or an oversight, or an error of interpretation, the large number of price violations, the almost complete absence of basic records

from which proper ceiling prices could be calculated by defendant or checked by the Office of Price Administration, the disparities between prices contained in the base period statement filed and those found in sales vouchers for March 1942, and the avoidance of proper price posting, are conclusive evidence of its systematic flouting of the entire price program.

The fact that relatively few of the total number of transactions of the store, or even of the departments visited, were investigated is not a mitigating factor. The significant factor is that wherever investigation was made, violations were found. At no time during the trial, did defendant attempt to show that compliance in the departments not investigated was any better than compliance in the departments into which inquiry was made, although those facts were also peculiarly within its knowledge. If new merchandise was sold at ceiling prices, it was not due to any effort to comply with the act, but solely to chance. Sales of commodities at unlawful prices were disclosed even *after* the defendant had determined the maximum prices for such commodities and had reported them to the Office of Price Administration. Gross negligence alone could account for such indifferent conduct. Only absolute disregard for the results can explain the number of items sold or offered for sale without being listed, or without establishing their maximum legal prices. As these required records were lacking, neither the public, nor even the Office of Price Administration, could determine whether a customer had been charged the legal price or not.

Even after defendant saw the challenge of its activities that was implied in the investigation, it took no steps to bring its operations into compliance with the Act. Defendant believed that it had a vested right, even in a war period, to continue its "business as usual" habits, which it had found to be so satisfactory and profitable in peace times. There could be no price control at all if every person subject to the Act and Regulation adopted the defendant's attitude in regard to filing supplemental statements "if I had a chance to get some of that stuff out I would do so" (R. 214), or in regard to shopping competitors on new commodities, "I have never done it and I don't propose to do that" (R. 226). Such conduct, if condoned, would inevitably result in price increases beyond all control.

It thus appears that while a defendant piously professed good intentions of complying with the law, in active practice it made the feeblest effort to do so, and then only under compulsion and merely to the extent that no hardship or inconvenience was incurred. This is not the sort of conduct which should receive the approval of a court of equity in determining whether an injunction should be granted in a case so deeply affected with the public interest. The success of the Act is dependent upon the patriotic cooperation of all persons to whom it is applicable. We submit that on this record if ever a case called for an injunction, it is this case.

In *Bowles v. Simon*, *supra*, 145 F. (2d) at p. 337 the court aptly said:

* * * considered together with the defendant's uncooperative and hostile attitude toward the Price Control Act, its enforcement and administration, his repeated violations of the regulations governing rent increases and minimum services, and his flagrant disregard for all warnings of the Administrator, constrains us to hold that the District Court abused its discretion in refusing this injunction. An injunction will not only insure better compliance with the Act, but seems essential to make this defendant comply with the Act. *Bowles v. NuWay Laundry Company, supra*; *Bowles v. Montgomery Ward & Co.*, 143 F. 2d, 38, 43. We think that this is true, even though the District Court generously found, in the face of defendant's hostility and repeated violations, that he will not commit future violations.

In *Bowles v. NuWay Laundry Co., supra*, the court said (p. 748):

The question remains whether an injunction, authorized by Section 205 (a) of the Act should issue. This suit was filed March 3, 1943, and at that time the Administrator prayed for temporary and permanent injunctive relief. Thereafter he sought without avail to compel appellee to comply with the regulations but his efforts were met with the recalcitrant non-compliance. * * * In our judgment the public interest fully justified injunctive relief in respect to the adjudicated violations and the case is reversed with directions to issue an injunction in accordance with the views expressed therein.

By defendant's own admission, good faith did not prevent its extensive violation in the past; and by the same token, even if its protestations of past good faith are sincere, there is no basis for concluding that good faith alone, without the prodding provided by an outstanding injunction, will any more successfully secure compliance in the future.⁴

If the judgment of the District Court is allowed to stand in this case, it cannot help but operate as an invitation to this defendant and others similarly situated to continue to flout a law "born of the exigencies of war" for the protection of the public against inflation. (See *Taylor v. United States*, 142 F. (2d) 808, 817 (C. C. A. 9th, 1944).)

We feel that such a result would not only be unfair to those other merchants who unselfishly and without complaint are complying with the law at great sacrifice of income and profit, but also would gravely endanger price control and nullify its enforcement.

Any easy attitude which even remotely suggests that the Act may be violated with impunity strikes at the entire enforcement program * * * (*Bowles v. Montgomery Ward & Company*, 143 F. (2d) 38, 42 (C. C. A. 7th, 1944)).

⁴ The fact that Defendant vigorously defended his past conduct is of itself a sufficient threat that he will violate in the future as to warrant the issuance of an injunction. *Sears, Roebuck & Co. v. Fed. Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919); *Otis & Co. v. Securities & Exchange Commission*, 106 F. (2d) 579 (C. C. A. 6th, 1939); *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395 (C. C. A. 5th 1942).

CONCLUSION

We respectfully submit that the judgment of the District Court should be reversed; that defendant's license should be suspended; or as an alternative that it be enjoined from further violating the Act and Regulations.

Respectfully submitted.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

SANDEN AND FERGUSON COMPANY, A MONTANA COR-
PORATION, APPELLEE

APPELLEE'S BRIEF

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Filed., 1945.

FEB 15 1945

.....Clerk.

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ADMINISTRATION, APPELLANT

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PORATION, APPELLEE

APPELLEE'S BRIEF

PROVISIONS OF THE ACT AND REGULATIONS

To the Appellant's statement as to the Provisions of the Act and Regulations should be added Sub-Section (h) of Section 902 Tit. 50 app.—“The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry * * * *.”

STATEMENT OMITTED BY APPELLANT

Appellant's statement should be amended considerably because the Appellant left out the most important part of the case.

The General Maximum Price Regulation (7 F. R. 3153, 3330) was issued April 28, 1942. It became effective as to retailers on May 18, 1942. It required sellers to prepare on or before July 1, 1942, a base period statement containing all the kinds of commodities that were sold during March 1942, together with their highest prices during that month.

This regulation became effective almost two months after March had gone and the defendant did not keep any permanent records of what goods it had on its shelves in March 1942, or what qualities, widths, weights, colors, sizes, finishes or textures of goods that were sold during March 1942. It had no records with which it could identify the goods which were sold in March 1942, with the names of manufacturers or lot numbers and had no records with which it could identify the goods which were on its shelves in May 1942, with manufacturer's or lot numbers and had no records with which it could identify the goods which it had on its shelves in May 1942, with goods which were sold in March 1942, with respect to manufacturers, lot numbers, qualities, widths, weights, colors, finishes or textures.

In January and February of 1943, when defendant made its Base Period Statement and its Cost of Living Commodity Statement it still could not identify the goods and that was the reason it could not do what the regulation required.

The evidence shows without contradiction that the defendant did not operate or maintain a per-

manent inventory system (R. 205). That it used the cost system. That it made only a categorical list of goods of prices and cost price when it took inventory at the first of the year. That it did not keep a record of the lot numbers, a description of the goods and the name of the manufacturer (R. 205). That that has always been its system (R. 205). That they had been in business since 1885 (R. 107). The defendant was maintaining the same records it always had (R. 221).

Plaintiff's own case by his own witness shows (R. 116) that it was impossible for the defendant to give lot numbers and describe the merchandise because the goods did not have lot numbers (R. 116). Plaintiff's own case by his own witness shows that effort was made (R. 116) to secure lot numbers but it was impossible to find further information (R. 116).

That to prepare the Base Period Statement the defendant was required to get lot numbers and secure the names of manufacturers and describe the article and show the retail price (R. 205) for March 1942, and the defendant's inventory did not show this.

That to prepare the Cost of Living Commodity List of prices the defendant was required to get the lot numbers and secure the names of manufacturers and describe the article (R. 205) and the defendant's inventory did not show this information.

Mr. Sanden testified they tried to do the best they could (R. 202). He and his sister went to the O. P. A.

Office and explained their predicament (R. 202, 210) and were told that it would be all right to prepare the list by taking the merchandise that was in the store at the time. (R. 202). He instructed his help to do the best they could (R. 208) but because of the fact that they did not have a permanent inventory system there was no name or lot number on the bolts, simply the cost and selling price and unless the person taking the inventory for the purpose of the base statement and cost of living commodity price list could identify the goods through memory he could not describe the goods on the statements (R. 208).

Mr. Sanden testified (R. 201) that some of his employees quit. Consequently with his old employees quitting and with no permanent inventory he was in a desperate situation (R. 201) where the lists had to be made from memory (R. 208).

As to whether or not the maximum prices were posted in the store Mr. Sanden testified that everything in the store was marked in plain figures (R. 215).

As to whether prices were raised Mr. Sanden testified that there were no markups at all (R. 215) the original tickets were on all articles just as they came in (R. 216). This evidence was corroborated by Lydia Clark (R. 187) who stated that there were no markups at any time.

When goods were sold by the clerks the sales slip was marked with the general name of the goods and price. There was no description of the goods on the

sales slips as to quality, width, texture, finish, color or weight (R. 135). A price of yardage did not have anything on it by which to identify it (R. 217) and because they had no permanent inventory, they had no record with which it could be identified.

The plaintiff introduced sales slips representing sales in March of 1942 and sales slips representing sales of goods during the year 1943 and compared the prices of the different articles but the goods sold in March, 1942, and the goods sold in March, 1943, or any time during 1943, could not be identified as the same goods as to quality, width, finish, color, or weight (R. 160) and neither could the goods sold be identified with the goods listed on the Base Period Statement or the Cost of Living Commodity List (R. 160).

The evidence shows that the different prices on the sales slips show that they represent different classes, weights, widths, and qualities, and finishes, and textures (R. 189).

The record shows without contradiction that immediately after the defendant received the warning notice (R. 119) which was on or about January 16, 1943, the defendant prepared and filed a Cost of Living Commodity Statement in February, 1943, (R. 109 Plaintiff's Exhibit No. 1) and at the same time made its base period statement (R. 110 Plaintiff's Exhibit No. 2) and that every effort was made to get the information required (R. 116).

The record shows that the requirement to file supplements to the cost-of-living commodity statement

was abolished by the plaintiff by Amendment No. 11 (7 F. R. 5192) before this case was filed.

The record shows that the plaintiff absolutely utterly failed to prove its case as he did not prove a single price was raised.

ARGUMENT.

POINT I.

In Point I of Plaintiff's Brief, Plaintiff argues that the Court raises the question as to the Constitutionality of the "Emergency Price Control Act of 1942, and the Maximum Price Regulation by its finding of fact No. 23, R. 78-79.

There is absolutely no merit to this argument of the plaintiff whatsoever. The trial Court found that, "If the Defendant were compelled by the Plaintiff to furnish in its base period statement and cost-of-living commodity statement all of the information required by the said General Maximum Price Regulation, the Defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system, etc."

This finding of the Court is in conformity with the Emergency Price Control Act 50 U. S. C. App. Sec. 902 Sub Sec. "h", "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods." This finding does not question the constitutionality of the act in any respect.

The finding is also in conformity with the General Maximum Price Regulation Section 1499.11

(b) "Prepare on or before July 1, 1942, on the basis of *all available information and records.*"

The finding is also in conformity with the evidence. The evidence shows without contradiction that the defendant had no records from which the base period statement could be made. The evidence shows that the defendant did not operate or maintain a permanent inventory system (R. 205). That it used the cost system. That it made only a categorical list of goods of prices and cost price when it took inventory at the first of the year. That it did not keep a record of the lot numbers, a description of the goods and the name of the manufacturer (R. 205). That that has always been its system (R. 205). That they had been in business since 1885, (R. 107) and were maintaining the same records it always had (R. 221).

Plaintiff's own case in chief, by his own witness, shows (R. 116) that it was impossible for defendant to give lot numbers and describe the merchandise because the goods did not have lot numbers (R. 116); that effort was made (R. 116) to secure lot numbers but it was impossible to find further information.

That to install a permanent inventory system it would cost \$2000.00 and would take two people full time at a cost of \$150 a month apiece to keep the permanent inventory going (R. 206). With this additional cost, it would be a question of whether they could keep going.

Then after the permanent inventory were installed, they could not give the prices and descrip-

tions of goods as of March of 1942, because the defendant had no records that this information could be taken from.

The plaintiff argued in part 2 of Point I that the Court questioned the validity of the regulation. There is absolutely no merit or foundation in this argument. The Court found exactly what the regulation required that the Base Period Statement was to be made up from the available records.

In Finding 18 (R. 77) the Court found that "Due to the fact that the Defendant had operated on a cost basis for over fifty years and not on a permanent inventory cash basis as aforesaid, the Defendant did not have some of the information required by said General Maximum Price Regulation such as lot numbers, names of manufacturers, descriptions of merchandise, and identification of merchandise * * * and for that reason and that reason alone, such information was not set out in said base period statement and said cost-of-living commodity statement." This finding is exactly according to the uncontradicted evidence as stated above.

Then in Finding 23 (R. 78-79) the Court found "If the defendant were compelled by the Plaintiff to furnish in its base period statement and cost-of-living commodity statement all of the information required by the said General Maximum Price Regulation, the Defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system which would cost at least \$2000.00 and require the Defendant to

employ two additional bookkeepers and compel the Defendant to close its place of business.”

This is a finding of fact. The plaintiff tries to argue that the cost of \$2000 was the reason the defendant gave for not having adequate books and records and cites cases on hardship. (Plaintiff's Brief 23), but that is not according to the facts. The facts show that the price regulation went into effect after March of 1942 had already passed and the defendant did not have the records to show what merchandise it had on its shelves in March of 1942, and even though it would change its system which neither the law nor the regulations required and which would cost \$2000, still it would not have the information required by the Maximum Price Regulation. The defendant had been doing business this way for over 50 years.

POINT II.

REFUTATION OF PLAINTIFF'S POINT II.

The Trial Court did not err in its Findings of Fact and Conclusions of Law (R. 66-95).

Bowles Adm. vs. Nu Way Laundry Co., 144 F. 2d 741 at 747—“The test is * * * whether the said purchasers were paying the same prices for the same services during the base period.”

The test in this case at bar then is whether the purchasers in 1943, were paying the same prices for the same articles as they did during March, 1942.

The burden would then be on the plaintiff to prove that the defendant charged more for goods

in 1943, than it did for the same article in March of 1942.

According to this test the plaintiff absolutely failed to prove his case.

The plaintiff argues in his Point II, on pages 27 and 28 of his brief that the only reasons the defendant did not file its base period statement showing the highest prices which it charged for all kinds and qualities of merchandise sold and delivered or offered for sale in March 1942, and its cost-of-living commodity statement before July 1, 1942, was because of shortage of help and the cost involved. Of course there was evidence and it was uncontradicted that its help was quitting and changing (R. 201) all the time. This, however, was not the main reason but it was important because due to the fact the defendant was not on a permanent inventory system, the only way lot numbers and names of manufacturers could be put in the Base Period Statement was that it had to be done by memory of the employees (R. 208) and the old employees had quit.

The only evidence of cost was where Mr. Sanden testified that it would cost \$2000 to install a permanent inventory system, but defendant's argument that cost was no excuse means nothing because if they had installed a permanent inventory system after March 1942, they would not have had the information the Maximum Price Regulation required because the defendant had no records to start with.

In part 2 of Point II in plaintiff's brief the plain-

tiff argues that defendant failed to file current monthly supplements of cost-of-living commodity statements. This is a moot question and means nothing because the Plaintiff had abolished the regulation requiring the monthly supplements before they filed the action against the defendant. It was abolished July 6, 1943, and this action was not filed until July 13, 1943. Courts will not pass on moot questions—State ex rel, O'Grady vs. District Court, 58 Mont. 695, 198 Pac. 1117.

In part 3 of Point II in plaintiff's brief the plaintiff says, "The defendant either falsified the prices listed in the two statements, or omitted to list in the base period statement the kinds and qualities that were sold at prices appearing in its March 1942, sales slips.

This is not even argument. In other words the plaintiff says the defendant either did this or that. If the plaintiff does not know what defendant did, it is one thing certain he did not prove anything.

The plaintiff asks himself a question on page 32 of his brief, "How, then, can the explanation for the amounts in the sales slips be reconciled with the amounts stated in the base and cost-of-living commodity statements?"

The Plaintiff's own witness answered that question for him on page 160 of the Record. He testified he could not identify the articles listed in the statements with the sales slips. He could not tell to what particular lots they referred to and the different lots and particular kinds of goods had dif-

ferent prices and also he could not identify the goods by the sales slips.

Again on Page 186, plaintiff's witness testified she could not tell the kind and quality of the goods as indicated on the sales slips. On page 185, this witness testified that with regard to denim there were ten to fifteen or twenty ranges, different qualities represented by the sales slips. On page 187 she testified there were fifteen or twenty qualities of gingham.

At no place does the plaintiff show that there was a raise in price of a single commodity over the prices of March, 1942. At no place does the plaintiff identify the sale of a single article in 1943, with the same article as sold or offered for sale in March 1942. Nor does the plaintiff identify the sale of a single article with the same article on the base period statement.

The evidence shows that the sales slips did not identify the article sold with the quality, width, texture, kind, weight, finish, size or color and therefore the articles could not be identified.

The evidence shows uncontradicted that the defendant did not raise the price of a single article in its store (R. 215 and R. 187).

POINT III.

The Trial Court's Findings of Fact comply exactly with the evidence.

1. Findings of fact 1 to 14 inclusive (R. 66-75) consist of uncontroversial facts. They consist of

the allegation in the complaint, jurisdiction of the Court, and the Maximum Price Regulations.

2. In Finding number 15 (R. 75) the Court found and the evidence shows that on or about February 1, 1943, (R. 109) and subsequent to receipt by it of the warning notice (R. 119) the defendant prepared a base period statement on the basis of all available information and records (R. 110-113), showing: (1) The highest prices which it charged for such of those commodities as it delivered during March 1942, and its offering price for delivery of such commodities during such month together with an appropriate description and identification of each of such commodities insofar as the Defendant was able to do so. (R. 202) Mr. Sanden testified "Well, it was essential that we prepare it, we tried to do the best we could about it." Then (R. 203) "We tried our best to list everything."

3. In Finding 16 (R. 76) the Court found and the evidence shows that "Continuously for more than 50 years (R. 107 In business since 1885) the defendant had operated on a cost basis (R. 205) and therefore did not keep records of the names of manufacturers, lot numbers, descriptions of merchandise, or identification of merchandise as to lot numbers, manufacturers, textures, grades, and so forth (R. 205)." The evidence also shows (R. 221) that the defendant was maintaining the same records it always had. (R. 221)

4. In Finding 17 (R. 76) the Court found and the evidence shows that in January 1943, prior to the

defendant's making its base period statement, Eugene Sanden, Assistant Manager went to the O. P. A. Office in Helena and explained to two officials the difficulties he was having in connection with operating the store and his help problem and that he was unable to furnish some of the information called for by said General Maximum Price Regulation and then and there had the understanding that it would be all right for the defendant to prepare said statements by taking the merchandise that was in defendant's store at the time and pursuant to that understanding the defendant endeavored to list all the merchandise in said store and did so to the best of its ability (R. 202, 203)." This conference of Mr. Eugene Sanden and O. P. A. officials was corroborated by Mr. McDermott, an O. P. A. Official (R. 192).

5. In Finding 18 (R. 77) the Court found and the evidence shows that due to the fact that the defendant had operated on a cost basis for over fifty years and not a permanent inventory cash basis, the defendant did not have some of the information required by said General Maximum Price Regulation such as lot numbers, names of manufacturers, descriptions of merchandise, and identification of merchandise which had previously been explained to said O. P. A. Officials and for that reason and that reason alone such information was not set out in said base period statement and said cost-of-living commodity statement. (R. 205 Testimony of Eugene Sanden).

6. In Finding 19 (R. 77) the Court found and the evidence shows that in February 1943, when said Base Period Statement and said cost-of-living commodity statement were prepared the defendant handled and had in its store for sale approximately 4000 different items of merchandise (R. 204), there was not then as much merchandise in the store as there was in March, 1942 (R. 204); and, new merchandise had come into said store which had replaced a great deal of the merchandise which had been in said store in March 1942, (R. 216 and 219).

7. In Finding 20 (R. 77) the Court found and the evidence shows that the merchandise which had come into said store subsequent to March 1942, and which had replaced a great deal of the merchandise which was in said store in March 1942, was of a different quality, grade, width, color, design and kind (R. 219).

8. In Finding 21 (R. 78) the Court found and the evidence shows that because of the fact that the defendant operated on a cost basis and not on a permanent inventory basis the sales slips of merchandise sold by it as indicated by exhibits introduced in evidence during the trial of this case were not marked with lot numbers, grades, width, and so forth, and as a result it was and is impossible to determine from said sales slips, or any of them, the quality, grade, width, color, design, or kind for the purpose of comparing sales prices shown on such sales slips and prices shown on said base period statement and cost-of-living commodity statement.

(R. 218) Eugene Sanden testified: Q. "Could you tell by looking at a slip that represented a sale in 1943, as of March and February and tell whether or not that is the same article that was in the store as of March 1942?" A. "No, we couldn't, could tell nothing from them sales slips, absolutely nothing."

Donald I. Creel, a witness for the plaintiff, testified the same that you could tell nothing from the sales slips or from the statements as to the grade, quality, weight and sizes (R. 160).

9. In Finding 22 (R. 78) the Court found and the evidence shows that to require that the Defendant mark sales slips of merchandise sold by it in its said store with lot numbers, grades, widths, and so forth on the quality, grade, width, color, design or kind for the purpose of comparing sales prices shown on sales slips and prices shown on its base period statement and cost of living commodity statement would be in operation and effect to use the powers granted in Section 2 of the Emergency Price Control Act of 1942, to be used and made to operate to compel changes in its business practices, cost practices and methods contrary to law. This is in conformity with the evidence as the evidence shows that the defendant had been on the cost system for over 50 years and if it were compelled to put in a permanent inventory system it would have to change its entire system of doing business. (R. 205)

10. In Finding 23 (R. 78) the Court found and the evidence shows if the defendant were compelled by plaintiff to furnish in its base period statement

and cost-of-living commodity statement, all the information required by the said General Maximum Price Regulation, the defendant would have to change its business practices and cost practices and methods by installing a permanent inventory system. This is clearly shown by the testimony of Eugene Sanden (R. 205).

11. In Finding 24 (R. 79) the Court found and the evidence shows that the base period statement and cost-of-living commodity statement hereinbefore referred to were carefully made by the Defendant in honest effort to meet the requirements of said General Maximum Price Regulation. (R. 208) Mr. Sanden testified, Q. "Mr. Sanden, you have been charged that the descriptions of the articles listed were indefinite, uncertain and confusing, and that it was impossible to determine what articles were priced, or the prices thereof. Explain to the Court that situation." A. "Well, it comes back to the point I have already tried to make; that we were operating under difficulties and those that were taking the inventory, the help taking the inventory, were instructed to do the best they could. Now in many of these instances here relative to these pieces of yard goods, because of the fact that we do not have a permanent inventory system, there is no name or no lot number often times on these bolts, simply the cost and selling price, so unless the person taking the inventory for the purpose of these price lists, cost of living commodity price list, could identify the goods sufficiently to show who the manufactur-

er was through memory or knowledge, why they simply had to give up; just do the best they could; that was the best that was possible under the circumstances."

(R. 209) Q. Is that the reason for the numbers being left off of the inventory?

A. That is correct.

Q. That is of this listing?

A. That is correct.

Q. The Court, as I understood it, there wasn't any bolt number to put in the list?

A. There wasn't; if there had been it would have been in the list.

Q. Mr. Sanden, you have been charged in the complaint that the statement did not contain an appropriate description or identification of the many commodities listed. That pertains to an appropriate description or identification?

A. Well, it goes back to the same thing again. We were unable to do it in some instances. Generally speaking I think we did in the large percentage of cases, but there were exceptions where we couldn't identify them, but it was not through any intent to not identify; it was simply a failure—

12. In Finding 25 (R. 79) the Court found and the evidence shows that a few sales slips were introduced in evidence during the trial of this case which indicate that the defendant sold in its store in March 1943 merchandise such as Black Bear heavy duck overalls which cost Defendant \$33.00 a dozen in Seattle for the regular sizes, and \$36.30 a dozen

for the extra sizes, all of which the Defendant sold below cost had not been listed on said cost-of-living commodity statement, but in each case the failure to list said merchandise was an error or an oversight and entirely without any intent to violate any provision of said General Maximum Price Regulation. (R. 202 and 203) Mr. Sanden testified, "I overlooked a carpenter's overall, Black Bear heavy white duck overall, manufactured by the Black Bear Company in Seattle, and I think we had a few pairs on hand under the shelf somewhere I overlooked in the rush. I made that mistake. I have the invoice right here now of the overalls; we sold them for \$3.00 apiece. I overlooked this one item here, and the overall cost us \$33.00 a dozen in Seattle for the regular sizes, and \$36.30 a dozen in Seattle for the extra sizes, and we sold them here in Helena for \$3.00 a pair. Now I don't think anybody has been injured there."

13. In Finding No. 26 (R. 79) the Court found and the evidence shows that at no time did the Defendant mark up any price on merchandise contained in its said store in March, 1942, and the original tickets showing the price at which such merchandise was offered for sale and would be delivered in March 1942, is and at all times has been plainly marked on the commodity itself; (R. 215) Mr. Sanden testified. "There have been no markups at all; there have been no markups in prices. It may be that new goods have come in and taken on those new prices but there have been no markups of the old goods in the house at that time. You go down

to the store today and you will find the original tickets on things that have been there a couple years and the prices are the same.”

“As these new things come in a sale may be made from this.—a dozen sales, twenty sales,—the prices will vary, likely because of different goods, different quality, different texture and widths, and so forth, from goods that have been on hand prior to them.

(R. 215) Mr. Sanden testified, Q. You have been charged in the Complaint that you failed to post or display a maximum price. Is that true?

A. That isn’t true at all. Everything is marked in plain figures; a bolt of goods has the price marked on the end of the bolt, a suit of clothes has a ticket on the suit, a lady’s hat has the ticket on the hat, so that is absolutely an untrue allegation.”

14. In Findings 27 to 39 inclusive (R. 80-93) Court found the facts relative to the sales of the defferent articles such as Gingham, Denim, Challis, Spun Rayon, Indian Head, Burlap, Eylette, Ticking, Percale, Gaberdine, Jersey, Overalls, Sateen. These findings are all substantiated by the evidence.

Take for example Gingham.

“The Court found in finding 27 (R. 80) Gingham was referred to in the cost-of-living commodity statement, “To February 1, 1943.” Plaintiff’s exhibit No. 1.

Article	Style	Number	Manuf.	Description	Price
Gingham	Golden Rod	Carson			.39

“It appears from Plaintiff’s Exhibit No. 5 introduced in evidence during the trial of this case, that in March, 1942, Defendant made six sales of gingham, a yard goods, three at 35c per yard, and three at 29c per yard; but, it is not shown that these were the only sales of gingham made by the Defendant in that month;”

“It appears from Plaintiff’s Exhibit No. 6, introduced in evidence during the trial of this case, that in February, 1943, Defendant made three sales of gingham, a yard goods, at 39c per yard;”

“It appears from Plaintiff’s Exhibit No. 25, introduced in evidence during the trial of this case, that in February, 1943, the Defendant received a shipment of gingham from “Butler Bros., Minneapolis, Minnesota;”

“It is not shown that the gingham referred to in said cost-of-living commodity statement and the gingham so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them, referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line; (see Plaintiff’s Exhibit No. 4 pp. 8 and 9) and

“It is shown that there are fifteen or twenty different qualities of gingham, that none of the March, 1942, sales slips show the quality, width, or color of the gingham sold; and that the gingham sold by the Defendant in March, 1942, (Plaintiff’s Exhibit

No. 5) and February, 1943, (Plaintiff's Exhibit No. 6) were not of the same quality."

The Court gives the transcript pages where the evidence is found in its findings.

See Record 138 where Plaintiff's Exhibit No. 5 was introduced into evidence.

See Record 140 where Plaintiff's Exhibit No. 6 was introduced into evidence.

See Record 164 where Plaintiff's Exhibit No. 25 was introduced.

See Record 222 where Plaintiff's Exhibit No. 4 was introduced entitled "What Every Retailer Should Know About the General Maximum Price Regulation.

When Plaintiff's Exhibits No. 5 and No. 6 were introduced there was no showing that these were the only sales of gingham made by the Defendant in March, 1942, and there is no such showing in any other part of the record.

There is also no showing by the plaintiff that the gingham referred to in said cost-of-living commodity statement and the gingham so sold and delivered by the Defendant in March, 1942, and February, 1943, or any of them referred to the same or similar articles or would give the purchaser fairly equivalent serviceability or belonged to a type which would ordinarily sell in the same price line. But the evidence does show that there are fifteen or twenty different qualities of gingham (R. 189), that none of the March, 1942, sales slips show the quality, width, or color of the gingham sold. (R. 179) Miss Lydia Clark called as plaintiff's witness testified:

Q. I direct your attention to Plaintiff's Exhibit

No. 5 and ask you to check through each one of those sales slips and tell us what they evidence the sale of?

A. Those are different qualities of gingham.

Q. I direct your attention to Plaintiff's Exhibit No. 6 with reference to the word "gin." What is that?

A. That's gingham.

Q. I will ask you to check through each one of the sales slips making up that exhibit and tell us what they represent only with regard to gingham?

A. Well, would be different qualities of gingham which is a yard goods.

(R. 191). Q. And the only way you can identify the quality and class of goods by the slips is by the price.

A. Yes.

Q. And the price might be different at different times in the store?

A. Yes.

Q. And each one of these classes of goods have a different classification? They have a different price range, quality, weights, widths, and so forth?

A. Yes, sir.

(R. 160) Mr. Donald I. Creel testified as plaintiff's witness:

Q. Referring to those various exhibits which have been introduced in evidence here as being also the slips of Sanden and Ferguson Company, covering the period of 1942 and 1943, there is no relation, is there, between the slips of 1942 and 1943 with relation to the goods listed except that it was a partic-

ular kind of goods listed at a certain price? Isn't that true?

A. That is all it shows on the slip, yes, sir.

(R. 218) Mr. Sanden testified:

Q. Could you tell by looking at a slip that represented a sale in 1943, as of March and February and tell whether or not that is the same article that was in the store as of March, 1942?

A. No. We couldn't, could tell nothing from them sales slips, absolutely nothing.

The record shows without contradiction that the evidence substantiates each of the Courts findings 27 to 39 just as it did with reference to gingham. Defendant does not think it necessary to repeat for each article.

Take plaintiff's argument with reference to gingham on pages 34 and 35 of Plaintiff's brief. He makes no showing whatsoever where the Trial Court erred in its finding with reference to gingham. He shows no evidence to substantiate this abstract contention that the defendant was in violation of anything.

The same condition applies to each of the articles, denim (Plaintiff's Brief 35), Challis (Plaintiff's Brief 37), Gaberdine (Plaintiff's Brief 38), Indian Head (Plaintiff's Brief 39), Percale (Plaintiff's Brief 40), Burlap (Plaintiff's Brief 41) Ticking (Plaintiff's Brief 42); Spun Rayon (Plaintiff's Brief 43), Jersey (Plaintiff's Brief 44), Overalls (Plaintiff's Brief 44), Sateen and Eylette (Plaintiff's Brief 45).

15. In Finding 40 (R. 93) the Court found and the evidence shows that the defendant at all times displayed its ceiling prices for all cost-of-living commodities carried in its store on or near the merchandise and easily visible to customers. (R. 215) Mr. Sanden testified, Q. You have been charged in the Complaint that you failed to post or display a maximum price. Is that true? A. That isn't true at all. Everything is marked in plain figures; a bolt of goods has the price marked in the end of the bolt. A suit of clothes has a ticket on the suit. A lady's hat has the ticket in the hat, so that is absolutely an untrue allegation."

At no place in plaintiff's brief does the plaintiff show where the trial Court erred in the findings of fact of the Court.

On page 55 of Plaintiff's Brief the plaintiff states that under Section 1499.2 of the Regulations, if a dealer is unable to price an article not previously handled, according to a similar commodity which he had handled, he must charge the highest prices of a most closely competitive seller.

The plaintiff offered no evidence that the defendant was selling any commodities at higher prices than his competitors. There is no allegation in the complaint that he was selling commodities at higher prices than his competitors.

There was evidence that defendant had no records to show the quality, grade, texture, finish, etc., of commodities it had sold.

There was no evidence introduced by plaintiff

and no allegation to the effect that defendant was unable to price an article not previously handled by it.

The plaintiff also states on page 55 of his brief "The Court also offered no explanation why in some instances, like gaberdine, the merchandise was sold or offered for sale at a price even in excess of that set forth in the cost-of-living commodity statement, or why in some instances, like canvas, the merchandise was not listed in the cost-of-living commodity statement at all."

It was not the duty of the Court to offer an explanation of anything. The Court made findings of fact as it found the facts.

The trouble is the plaintiff was the one who did not offer an explanation or offer any evidence that would explain it.

The defendant proved by evidence introduced that the difference in prices was due to different widths, qualities, textures, colors, finishes, etc. The defendant proved by evidence and the Court found that in some instances where commodities were left out of the statement, it was by error and not by intention and that it had to list the articles which were on the shelves at the time the list was made when it did not have it in stock at that time. That it had no permanent inventory it could get the information asked for.

POINT IV.

The Judgment of the Court is substantiated by the

findings of fact and conclusions of law and should be affirmed.

The evidence showed and the court found that the defendant has at all times endeavored in good faith to comply with and abide by the provisions of the Emergency Price Control Act of 1942 and with each and all of the rules and regulations issued thereunder and intends to and will continue to do so at all times in the future.

The Court found, finding 42 (R. 94), that it is not shown that the Defendant ever at any time or at all engaged, or that it is about to engage, in any act or practice contrary to the provisions of the Emergency Price Control Act of 1942, or any rule or regulation issued thereunder, including said General Maximum Price Regulation or any regulation supplemental thereto or amendatory thereof.

The evidence of Eugene Sanden as shown herein still stands uncontradicted that he endeavored to do the best he could and at no time did the defendant mark up the prices of merchandise it had or offered for sale March of 1942, or at any other time.

The case at bar comes clearly within the rules of law decided in the case of *Hecht Co. vs. Bowles*, 321 U. S. 321. The plaintiff says in his brief "In the *Hecht Case*, the absolute good faith of the defendant was unquestioned." (Plaintiff's Brief 62). The same thing applies to this case; no evidence was offered to the contrary.

On page 60 of Plaintiff's brief the plaintiff states, "It is true that whether an injunction should issue in

any case rests in the sound discretion of the Court.” That is what the Hecht case held. Surely in the case at bar where the plaintiff failed to show where the Court erred in its findings of fact, the Court had the right to dismiss the case and the Judgment should be affirmed.

Respectfully submitted,

PAUL W. SMITH,

DAVID R. SMITH,

*Attorneys for Defendant
and Appellee.*

No. 10909

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD C. STROTZ,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB - 2 1945

PAUL P. O'BRIEN,
CLERK

No. 10909

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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DEBTOR'S PETITION

In the District Court of the United States for the
Southern District of California

Central Division

In Bankruptcy

No.

In the Matter of

HAROLD C. STROTZ,

Bankrupt.

To the Honorable Judge of the District Court of the
United States for the Southern District of California:

The Petition of Harold C. Strotz, residing at No. 9243 Doheny Road, in the City of Los Angeles, County of Los Angeles, State of California, by occupation a (None) now, formerly a stock-broker, and employed by None (or engaged in the business of.....), respectfully represents:

1. Your petitioner as resided, (or has had his domicile) at 9243 Doheny Road, Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceeding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible

to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

Harold C. Strotz
Petitioner

SIMON & GARBUS

By Morton Garbus
Attorney for Petitioner

State of California
County of Los Angeles—ss.

I, Harold C. Strotz, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Harold C. Strotz,
Petitioner

Subscribed and sworn to before me this 21st day of October, 1940.

Eugene H. Frank,
Notary Public in and for the County of Los Angeles,
State of California. [2]

Summary of Debts and Assets
(From the Statements of the Debtor in
Schedules A and B)

		Dollars	Cents
Schedule A....1—a	Wages	None	
Schedule A....1—b (1)	Taxes due United States	None	
Schedule A....1—b (2)	Taxes due States	None	
Schedule A....1—b (3)	Taxes due counties, districts and municipalities	None	
Schedule A....1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	None	
Schedule A....1—c (2)	Rent having priority	None	
Schedule A....2	Secured claims	\$833,411.70	
Schedule A....3	Unsecured claims	1,048,419.16	
Schedule A....4	Notes and bills which ought to be paid by other parties thereto	None	

Schedule A....5	Accommodation paper	None
	Schedule A, total	\$1,881,830.86
Schedule B....1	Real estate.....	None
Schedule B....2—a	Cash on hand.....	None
Schedule B....2—b	Negotiable and non-negotiable instruments and securities	None
Schedule B....2—c	Stocks in trade....	None
Schedule B....2—d	Household goods....	\$100.00
Schedule B....2—e	Books, prints and pictures	None
Schedule B....2—f	Horses, cows and other animals	None
Schedule B....2—g	Automobiles and other vehicles See B-4.....	(\$525.00)
Schedule B....2—h	Farming stock and implements	None
Schedule B....2—i	Shipping and shares in vessels.....	None
Schedule B....2—j	Machinery, fix- tures and tools	None
Schedule B....2—k	Patents, copyrights, and trade-marks	None

Schedule B....2—1	Other personal property	None
Schedule B....3—a	Debts due on open accounts	None
Schedule B....3—b	Policies of insur- ance	None
Schedule B....3—c	Unliquidated claims	None
Schedule B....3—d	Deposits of money in banks and elsewhere	None
Schedule B....4	Property in rever- sion, remain- der, expectancy or trust.....	\$525.00
Schedule B....5	Property claimed as exempt Exempt	(\$100.00)
Schedule B....6	Books, deeds and papers	
		<hr/>
Schedule B, total		\$625.00
		<hr/> <hr/>

Harold C. Strotz,
Petitioner

Schedule A. Statement of All Debts of Bankrupt
Schedule A-1.

Statement of all creditors to whom priority is secured
by the act.

		Amount due or Claimed	
		Dollars	Cents
<hr/>			
<p>A.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition. Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.</p>			
None		None	

B.—Taxes due and owing to—		
(1) The United States	None	
(2) The State of California	None	
(3) The county, district or municipality of Los Angeles	None	None
State of California		

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that

fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.

C.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom.

None

None

C.—(2) Rent owing to a landlord who is entitled to priority by the laws of the State of, accrued within three months before filing the petition, for actual use and occupancy.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt; and whether

incurred or contracted as partner or joint contractor and, if so, with whom.

None

None

=====

Total

None

Harold C. Strotz,

Petitioner

[4]

Schedule A-2

Creditors Holding Securities

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher—Names of Creditors, Residences (if unknown that fact must be stated)—Description of Securities—When and where debts contracted, and nature and consideration thereof—whether claim is contingent, unliquidated or disputed.

Estate of Pauline D. Rudolph, c/o
Chicago Title and Trust Company,
Chicago, Illinois.

Value of
SecuritiesAmount due
or Claimed

For moneys advanced, represented
by two judgments on promissory
notes—(1) for \$350,000 (2) for

\$150,000—both dated February 15, 1930, with interest at 3% per annum on No. (1) and 5% per annum on No. (2) to maturity, maturing 1 year from date, and after maturity at the rate of 7% per annum of each of the notes.

Said promissory notes, together with interest thereon to May 1, 1940, approximated \$802,411.77. Nothing has been paid on principal or interest to date.

\$802,411.77

On February 15, 1930, petitioner executed a collateral trust agreement in favor of Chicago Title and Trust Company of Chicago, Illinois, as trustee for Pauline D. Rudolph, by the terms of which petitioner purported to transfer as collateral security for said indebtedness and the notes evidencing same, all of his right, title and interest as beneficiary under the Last Will and Testament of petitioner's father, Charles Nicolas Strotz. Pursuant to paragraph XXII of said Last Will and Testament of petitioner's father, Charles Nicolas Strotz, which is a "spendthrift clause," petitioner's interest in the estate of his father is expressly declared to be not a

vested interest and not subject to the right to anticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.

* * *

John H. Fahey, trustee for Franklin Dohn Rudolph—trust agreement dated July 27, 1935. Franklin Dohn, Charles Dohn, Pauline Dohn, Rudolph Sherman, Herbert N. Butz. The following language is applicable to all of the above names: (Address: c/o Chicago Title and Trust Company, Chicago, Illinois.)

On May 31, 1940, your petitioner executed an agreement in writing in favor of all of the persons here named, by the terms of which, petitioner acknowledged his indebtedness to said estate of Pauline D. Rudolph, deceased, in the sum of \$802,411.77, all of said persons named being trustees, beneficiaries or otherwise interest in said claim and estate.

Total \$802,411.77

* * *

Harold C. Strotz,
Petitioner

[5]

Schedule A-2

(Cont'd)

Creditor Holding Security

	Value of Securities	Amount due or Claimed
Continental Illinois National Bank and Trust Company of Chicago, 231 South La Salle Street, Chicago, Illinois.		

For moneys owed as evidenced by a promissory note executed by petitioner July 1, 1935, in the principal sum of \$23,044.70, together with interest thereon from the date thereof to date, estimated to be in the sum of approximately \$7,955.23. On November 6, 1935, your petitioner executed what purports to be an authorization directed to First National Bank of Chicago, as trustee of the residuary trust estate created under the last Will and Testament of Charles Nicolas Strotz, deceased, authorizing said trustee to pay to the said Continental Illinois National Bank and Trust Company of Chicago the foregoing claim of indebtedness out of any of the assets which your petitioner might be entitled to receive from the residuary trust estate at the time fixed for distribution of the

corpus thereof. Reference is here again made to paragraph XXII the Last Will and Testament of petitioner's father, Charles Nicolas Strotz, as to the spendthrift trust provision thereof.

	\$30,999.93
Total	\$30,999.93

Harold C. Strotz,
Petitioner
[6]

Schedule A-3.

Creditors whose Claims are Unsecured

(N.B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Amount due or Claimed	
Dollars	Cents

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner

or joint contractor with any other person; and, if so, with whom.

Martin T. O'Brien, as Receiver for Reliance Bank and Trust Company, Chicago, Illinois, c/o attorneys William J. Curren, Jr. and Harold F. Clary, 811 West Seventh Street, Los Angeles, California—

Judgment obtained in Superior Court, Los Angeles, California, in action No. 444462, based upon judgment in Cook County, Illinois; action General No. 558936, based upon statutory and constitutional liability of petitioner as stockholder of said bank. Judgment entered September 13, 1940, in Judgment Book 1098 at page 127, Records of County Clerk at Los Angeles, \$48,865.58, together with interest thereon as provided by law. Attorneys for plaintiff: William J. Curren, Jr. and Harold F. Clary, 811 West Seventh St., Los Angeles, California.

\$ 48,865.58

* * *

Mary Flanagan, Catherine F. Malloy, Elizabeth Swindle, Leonard F. McGee, John B. Harrington, doing business as McGee & Harrington, Leonard F. McGee, Logan L. Mullins, as Receiver of Madison Square State Bank, a corporation, c/o William A. Sherwin, 542 South Broadway, Los Angeles, California.

Judgment obtained in the Superior Court, Los Angeles, California, in action No.

432312, based upon judgment of Cook County, Illinois, action General No. 559485, based upon statutory and constitutional liability of petitioner as stockholder of said bank. Judgment entered September 23, 1940, in records of County Clerk, County of Los Angeles. for \$35,811.10, together with interest thereon, as provided by law, and costs of suit in the sum of \$13.00. Attorney for plaintiff, William A. Sherwin, 542 South Broadway, Los Angeles, California.

35,824.10

* * *

Hamilton Vose, Jr., 450 West Superior Street, Chicago, Illinois.

For moneys advanced as represented by promissory note in the original sum of \$9,000.00, together with interest thereon accumulated to date in a sum totalling, principal and interest, approximately \$12,500.00; the exact date and amount of said note and interest cannot at this time be ascertained.

\$ 12,500.00

* * *

Seneca Securities Co. or Corp. c/o Irving Herriott, 120 South La Salle Street, Chicago, Illinois (last known address).

For moneys advanced as represented by a judgment in the original sum of \$13,500.00, together with interest thereon accumulated to date in a sum totalling, principal and interest, approximately \$16,000.00; the ex-

act date and amount of said judgment cannot at this time be ascertained. Judgment rendered in Cook County, Illinois.

\$ 16,000.00

=====

Total \$113,189.58

Harold C. Strotz,
Petitioner

[7]

Schedule A-3 Continued

Creditors whose Claims are Unsecured

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

=====

Amount due
or Claimed
Dollars Cents

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.

Eugenia A. Vandever, c/o Mr. Earl Deming, Taylorville, Illinois.

Moneys due by terms of property settlement agreement, as represented by a promissory note or notes in the original sum of \$150,000.00. Interest estimated thereon due in the sum of \$55,000.00. Principal and interest to date approximately \$205,000.00.

\$205,000.00

* * *

Weinress & Company, 231 South La Salle Street, Chicago, Illinois. Also c/o Ben W. Heineman, Attorney at Law, 1 North La Salle Street, Chicago, Illinois.

For moneys owed as represented by a promissory note payable on demand, executed by petitioner February 29, 1931, in the sum of \$14,810.57, accumulated interest thereon to August 30, 1938, being \$5,430.33 at 5%, equalling an aggregate sum of \$20,420.90. Estimated interest to date, in addition, \$2,150, making a total obligation to date in the sum of \$22,390.90.

22,390.90

* * *

Clara A. Strotz, 622 North Sierra Drive, Beverly Hills, California.

For moneys owed, as represented by a promissory note or notes, upon which there is now due on account of principal and interest the sum of approximately \$193,984.54. The exact dates of said notes and

the exact principal obligation are unknown
to petitioner.

193,984.54

* * *

Mrs. Bertha Feld, 622 North Sierra Drive,
Beverly Hills, California.

For moneys owed, as represented by a
promissory note, upon which there is now
due on account of principal and interest
the sum of approximately \$17,000.00. The
exact date of said note and the exact prin-
cipal obligation is unknown to petitioner.

17,000.00

* * *

John J. Mitchell, 310 South Michigan Boule-
vard, Chicago, Illinois.

For moneys owed as represented by a prom-
issory note in the principal sum of approxi-
mately \$10,000.00, plus accumulated in-
terest thereon in the sum of \$9,000.00, be-
ing a total obligation to date of approxi-
mately \$19,000.00. The date of execution
and the exact principal amount thereof is
unknown to petitioner.

19,000.00

* * *

F. B. Keech & Co.—Estate of F. B. Keech,
c/o Earnest Early of McCanliss & Early, 31
Nassau Street, New York, N. Y.

For moneys due to F. B. Keech & Co.,
brokers, by reason of partnership interest
at time of stock market crash. Said ob-

ligation to the firm at that time amounted to \$477,854.14. No claim has been asserted by F. B. Keech & Co. for the pay-

Total \$457,375.44

Harold C. Strotz,
Petitioner
[8]

Schedule A-3 Continued

Creditors whose Claims are Unsecured

Amount due
or Claimed

ment thereof, save and except that Col. Frank Browne Keech, during his lifetime, agreed that he would accept from the petitioner the sum of \$50,000.00 in full settlement of said obligation. At that time your petitioner executed a promissory note made payable to Col. Frank Browne Keech in the sum of \$50,000.00, which promissory note has never been paid. Your petitioner does not know whether he is released from his obligation to F. B. Keech & Co. and/or Col. Frank Browne Keech in the sum of \$477,854.14, and that whether in lieu thereof his obligation would now be \$50,000.00, plus interest thereon, and therefore your petitioner lists this debt in the

total original sum, together with any in-	
terest thereon that might be claimed.	\$477,854.14
Total	\$477,854.14

Harold C. Strotz,

Petitioner

[9]

Schedule A-4

Liabilities on Notes or Bills Discounted which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.

(N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

Amount due
or Claimed.
Dollars Cents

Reference to Ledger or Voucher.—Names of holders as far as known.—Residences (if unknown, that fact must be stated).—Place where contracted.—Whether claim is disputed.—Nature and consideration of liability, whether same was contracted as part-

ner or joint contractor, or with any other person; and, if so, with whom.

None

None

Total

None

Harold C. Strotz,

Petitioner

[10]

Schedule A-5

Accommodation Paper

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

Amount due
or Claimed.
Dollars Cents

Reference to Ledger or Voucher.—Names of Holders.—Residences (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as partner

or joint contractor, or with any other person; and, if so, with whom.

None

None

 Total

None

Harold C. Strotz,
Petitioner

Oath to Schedule A

State of California

County of Los Angeles—ss.

I, Harold C. Strotz, the person whose name subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

Harold C. Strotz,
Petitioner

Subscribed and sworn to before me this 21st day of October, 1940.

(Seal)

Eugene H. Frank,

Notary Public in and for the County of Los Angeles,
State of California.

ner or joint contractor, or with any other person; and, if so, with whom.

None

None

Total

None

Harold C. Strotz,

Petitioner

[10]

Schedule A-5

Accommodation Paper

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

Amount due
or Claimed.
Dollars Cents

Reference to Ledger or Voucher.—Names of Holders.—Residences (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as partner

Rights and Powers, Legacies and Bequests

Interest in the estate of Anne Gould

Strotz, deceased, probate No. 179971,

Superior Court, Los Angeles, California

\$525.00

Total

\$525.00

Property heretofore conveyed for benefit
of creditors.

Amount
realized as
proceeds of
property
conveyed

Portion of debtor's property conveyed by deed
of assignment, or otherwise, for the benefit
of creditors; date of such deed, name and
address of party to whom conveyed; amount
realized therefrom, and disposal of same, as
far as known to debtor.

Attorney's Fees.

None

None

Sum or sums paid to counsel, and to whom,
for services rendered or to be rendered in
this bankruptcy.

None

None

=====

Total

None

Harold C. Strotz,

Petitioner

[17]

Schedule B-4.

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

		Estimated Value of Interest. Dollars Cents	
General Interest.	Particular Description.		
Interest in Land	None	None	
<hr/>			
Personal Property	None	None	
<hr/>			
Property in Money, Stock, Shares, Bonds, Annuities, etc.	None	None	
<hr/>			

Schedule B-5.

Property claimed as exempt from the operation of the
Act of Congress relating to bankruptcy.

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

=====

	Valuation	
	Dollars	Cents
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.	None	None

Property claimed to be exempt by State laws,
with reference to the statute creating the
exemption.

Limited wardrobe and household goods and personal effects—under Section 90.2 of the Code of Civil Procedure of the State of California.	\$100.00
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=====

Total	\$100.00
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Harold C. Strotz
Petitioner

Schedule B-6.

Books, Papers, Deeds and Writings relating to
Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody, or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

	=====	
	Dollars	Cents
Books	None	None
<hr/>		
Deeds	None	None
<hr/>		
Papers	None	None
<hr/>		

Harold C. Strotz
Petitioner

OATH TO SCHEDULE B

State of California, County of Los Angeles—ss.

I, Harold C. Strotz, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

Harold C. Strotz
Petitioner

Subscribed and sworn to before me this 21st day of October, 1940.

(Seal) Eugene H. Frank
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Oct. 22, 1940. [20]

[Title of District Court and Cause.]

ADJUDICATION AND ORDER OF REFERENCE

At Los Angeles, in said District, on October 23, 1940 before the said Court in Bankruptcy, the petition of Harold C. Strotz that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said Harold C. Strotz is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Ernest R. Utley, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Harold C. Strotz shall attend before said Referee on October 30, 1940 at his office in Los Angeles, California at 10 o'clock a. m., and shall submit to such orders as may be made by said Referee or by this Court relating to said matter in bankruptcy.

Witness, the Honorable Paul J. McCormick, Judge of the said Court, and the seal thereof, at Los Angeles, in said District, on October 23, 1940.

(Seal)

R. S. ZIMMERMAN,
Clerk,

By M. M. Karcher,
Deputy Clerk.

[Endorsed]: Filed Oct. 23, 1940. [21]

[Title of District Court and Cause.]

AMENDMENT TO SCHEDULE A. 3.

Name of Creditor	Address
Central Republic Bank & Trust Company, Pledgor	Chicago, Illinois
Reconstruction Finance Corp., Pledgee	United States Agency Chicago, Illinois Office.

Judgment obtained by Reconstruction Finance Corporation against your petitioner and nine other directors of the Madison Square State Bank of Chicago, in Appellate Court of Illinois, on or about December 31, 1940, for \$245,811.00

Your petitioner was one of ten former directors of the Madison Square State Bank of Chicago, Illinois, who jointly executed a promissory note in the sum of approximately \$210,000.00, in the year 1930, the exact date of which is unknown to petitioner, to the order of Central Republic Bank and Trust Company, which said promissory note was pledged by it to Reconstruction Finance Corporation, as part of the security given for a loan in the sum of \$90,000,000.00, from the Federal Agency in the year 1932; that an action was commenced to enforce the payment of said promissory note by the said Reconstruction Finance Corporation, against your petitioner and the said other directors of the Madison Square State Bank of Chicago, but judgment in said action was in favor

of the petitioner and the said directors, entered on April 24, 1936, in the Circuit Court of the State of Illinois.

That on December 31, 1940, there appeared a news item in the Journal of Commerce of Chicago, Illinois, reporting the fact that the Appellate Court of Illinois, had reversed the judgment of the Circuit Court, the result of which reversal, in the opinion of your petitioner, reinstates a claim against him upon said promissory note; that the judgment of reversal against your petitioner and the other former directors of the Madison Square State Bank of Chicago, is in the sum of \$245,811.00.

Previous Total of Schedule A. 3	457,375.44
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[22]

Amount brought forward	\$703,186.44
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Present Total of Schedule A. 3	\$703,186.44
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Previous Total of Schedule A	\$1,881,830.86
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Amended Claim to Schedule A. 3	245,811.00
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Present Total of Schedule A.	\$2,127,641.86
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Dated: Los Angeles, California
January 6, 1941.

HAROLD C. STROTZ

Petitioner.

Oath to Schedule A.

State of California :

County of Los Angeles : ss

I. Harold C. Strotz, the person whose name subscribed to the foregoing Schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information and belief.

HAROLD C. STROTZ

Petitioner.

Sworn and subscribed to before me this 7th day of January, 1941.

(Seal)

EUGENE H. FRANK

Notary Public in and for said County and State.

[Endorsed]: Filed Jan. 8, 1941 at min. past 12 o'clock m. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed Jan. 9, 1941. [23]

[Title of District Court and Cause.]

PETITION FOR ARRANGEMENT UNDER
CHAPTER XI, SECTION 321.

To the Honorable District Court of the United States,
Southern District of California:

The petition of Harold C. Strotz, residing at 9243
Doheny Road, Los Angeles, California, not now having
any occupation but previously being engaged as a stock
broker, respectfully represents:

I.

That your petitioner has been duly adjudged a bank-
rupt on a petition filed by him in the above entitled court,
on the 22nd day of October, 1940.

II.

That in connection with the filing of his said petition
as aforesaid, your petitioner has filed and presented to
the above entitled court a Summary of Debts and Assets,
together with his oath attached thereto, as well as a State-
ment of Affairs, together with his oath attached thereto,
reference to which Petition, Summary of Debts and As-
sets and Statement of Affairs is hereby made for all par-
ticulars contained therein, and all of the same are made
a part hereof as if set forth herein at length.

III.

That in accordance with Chapter XI of the Bankruptcy
Act, Section 321 thereof, petitioner now respectfully pre-
sents this Petition in the above mentioned pending bank-
ruptcy Petition after his adjudication as aforesaid, for
the reason that he desires to effect an Arrangement with
his creditors, the provisions of which are hereinafter set
forth.

IV.

That in the opinion of petitioner, it would be to the best interests of all of his creditors who have filed claims in this bankruptcy [24] proceeding to avail themselves of, and to accept, the Arrangement here offered.

V.

That for approximately ten (10) years last past your petitioner has not been engaged in any business or occupation of any consequence by reason of the fact that he has been insolvent and has been indebted to many persons, firms and corporations in a sum far in excess of his ability to pay, said total indebtedness amounting to the sum of \$2,127,641.86.

VI.

That all of said debts are of long standing, having been incurred during, and as a result of, the stock market crash of 1929; that a portion of said debts arose by reason of the statutory liability of petitioner as an officer and director of national banks. That said national banks claim obligations which so arose and for which claims were filed as follows:

Logan L. Mullins, Receiver of Madison Square State Bank, in the sum of \$35,811.10;

Martin T. O'Brien, Receiver of Reliance Bank and Trust Company, in the sum of \$48,868.58;

That the claim of Reconstruction Finance Corporation on file herein in the sum of \$340,566.44, in connection with which litigation is now pending, originally arose approximately eight (8) years ago, and is based upon an alleged guarantee joined in by the petitioner, together with

nine (9) other directors of a defaulting bank in Chicago, Illinois;

That the claim on file herein of Ernest R. Earley, Executor of the estate of Frank Browne Keech, in the sum of \$50,000.00, is a compromised obligation arising out of the said stock market crash;

That the claim of Continental Illinois National Bank and Trust Company, on file herein in the sum of \$32,055.70, was incurred on or before July 1, 1935, and was in the original sum of \$23,044.70, the increased amount being for interest accrued thereon; [25]

That the claim of W. E. Fleming, agent for Eugenia Vollentine, on file herein in the sum of \$168,410.85, and listed for a somewhat larger amount in the Schedule of your petitioner as being the claim of Eugenia A. Vandaveer, is of long standing and represents moneys due by the terms of a property settlement agreement;

That the claim of John J. Mitchell, on file herein in the sum of \$8,966.87, and listed in the Schedule of the petitioner on file herein in the sum of \$19,000.00, is a claim of long standing, the exact date of which cannot now be determined;

That the claim of Seneca Securities on file herein in the sum of \$13,094.85 and listed in the Schedule of petitioner on file herein in the sum of \$16,000.00, is an obligation of long standing, the exact date of which cannot at this time be ascertained.

Whereas your petitioner has filed his Schedule herein showing total debts owing by him, secured and unsecured, in the sum of \$2,127,641.86, there has been filed to the date hereof, creditors' claims totalling only the sum of

\$697,774.39, of which the claim of Reconstruction Finance Corporation, equalling approximately one-half ($1/2$) of said total claims, is contingent and now in litigation; of the balance of said total claims on file herein, petitioner is informed and believes, and therefore asserts that it may be possible to secure a release from W. E. Fleming, agent for Eugenia Vollentine, of her claim in the sum of \$168,410.85, as well as a release from the claim of Ernest R. Earley, Executor of the Estate of Frank Browne Keech, in the sum of \$50,000.00; that as a result of such releases, if the same could be obtained, the total amount of claims subject to this Arrangement would therefore be to that extent reduced.

VIII.

Proposed Arrangement

A. Secured Creditors:

1. Your petitioner is indebted to the estate of Pauline D. Rudolph and to Franklin N. Dohn, Charles Dohn, Pauline Dohn, Rudolph Sherman, Herbert N. Butz, John A. Faher, Trustee for Franklin Dohn Rudolph, in [26] the sum of \$827,411.77, which claim is secured by a collateral trust agreement in the favor of Chicago Title and Trust Company of Chicago, Illinois, as trustee for Pauline D. Rudolph, by the terms of which petitioner proposed to transfer, as collateral security for said indebtedness, all of his right, title and interest as beneficiary under the Last Will and Testament of Charles

Nicolas Strotz, deceased. This creditor has not filed a claim in this bankruptcy proceeding to the date hereof.

2. Your petitioner is also indebted to Continental Illinois Bank and Trust Company of Chicago, Illinois, in the sum of \$32,055.70. In connection with this indebtedness, your petitioner executed what purports to be an authorization directed to the First National Bank of Chicago, as Trustee of the residuary trust estate created under the Last Will and Testament of petitioner's father, Charles Nicolas Strotz, deceased, authorizing said trustee to pay the claim of the said creditor out of any of the assets which your petitioner might be entitled to receive from said residuary trust estate at the time fixed for the distribution of the corpus thereof.

The above two are the only secured creditors of petitioner. In view of the fact that there are no assets in this bankruptcy estate, available for secured creditors, save the interest which petitioner may have in his father's trust estate as aforesaid, and in view of the fact that the secured creditor, estate of Pauline D. Rudolph, as aforesaid, has not filed any claim herein, this Arrangement will apply equally to secured and unsecured creditors filing claims.

B. Unsecured Creditors:

All unsecured debts affected by this Arrangement shall be treated on a parity, save and except those creditors who may, in order to assist the petitioner in effecting this Arrangement, waive any claim to share therein.

Your petitioner has no property or assets of any kind, but will arrange to obtain from his family, and will offer to his creditors, [27] cash in the sum of \$10,000.00. In addition to said sum of \$10,000.00, your petitioner will execute any necessary writing, by the terms of which he will assign to his creditors who may have an interest in this bankruptcy proceeding and a right to share therein, ten per cent (10%) of the right, title or interest which petitioner may have as beneficiary under the Last Will and Testament of his father's estate, Charles Nicolas Strotz, deceased. Attention is here called to the fact that pursuant to Paragraph XII of said Last Will and Testament of petitioner's father, which is a "Spendthrift *Claus*" provision, petitioner's interest in his father's estate is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.

It is the intention of the petitioner, in making this offer to his creditors, that any and all proceedings which may now be pending by the Trustee in Bankruptcy herein, to set aside any conveyances heretofore made by petitioner, on the ground of fraud, be dismissed. This intention is here expressed, on the ground that petitioner has not entered into any fraudulent conveyances, and that in making this Arrangement, he desires to settle and compromise all claims of creditors who may have filed their claims herein, as well as any claims of any person or persons who may suffer loss by reason of any proceeding

to set aside a conveyance of property made to him or them by your petitioner.

IX.

Should this Arrangement be confirmed and approved by the above entitled Court, petitioner will execute all necessary documents and papers to put into effect the proposed Arrangement.

X.

Your petitioner presents this Arrangement in good faith, without any intention to defraud or deceive his creditors, and this Arrangement is for the best interests of his creditors and is fair, equitable and feasible.

Wherefore, petitioner prays that this petition be referred, pursuant to Section 321 of Chapter XI of the Bankruptcy Act, to a Referee, and that thereafter all proceedings be had in this case, in accordance with the provisions of said Chapter XI of said Bankruptcy Act, and for general relief.

Dated: April 28, 1941.

SIMON & GARBUS

By Morton Garbus

Attorneys for Petitioner

[Verified.]

[Endorsed]: Filed Apr. 30, 1941 at 45 min. past 11 o'clock a. m. Ernest R. Utley, Referee; Meredith Keith, Clerk.

[Endorsed]: Filed May 5, 1941. [29]

[Title of District Court and Cause.]

AMENDED PETITION FOR ARRANGEMENT
UNDER CHAPTER XI, SECTION 321

To the Honorable District Court of the United States,
Southern District of California:

The Amended Petition of Harold C. Strotz, residing at 9243 Doheny Road, Los Angeles, California, not now having any occupation but previously being engaged as a stock broker, respectfully represents:

I.

That your petitioner has been duly adjudged a bankrupt on a petition filed by him in the above entitled Court, on the 22nd day of October, 1940.

II.

That in connection with the filing of his said petition as aforesaid, your petitioner has filed and presented to the above entitled Court a Summary of Debts and Assets, together with his oath attached thereto, as well as a Statement of Affairs, together with his oath attached thereto, reference to which Petition, Summary of Debts and Assets and Statement of Affairs is hereby made for all particulars contained therein, and all of the same are made a part hereof as if set forth herein at length.

III.

That in accordance with Chapter XI of the Bankruptcy Act, Section 321 thereof, petitioner now respectfully presents [30] this Amended Petition in the above mentioned pending bankruptcy Petition after his adjudication as aforesaid, for the reason that he desires to effect an Arrangement with his creditors, the provisions of which are hereinafter set forth.

IV.

That in the opinion of petitioner, it would be to the best interest of all of his creditors who have filed claims in this bankruptcy proceeding to avail themselves of, and to accept, the Arrangement here offered.

V.

That for approximately ten (10) years last past your petitioner has not been engaged in any business or occupation of any consequence by reason of the fact that he has been insolvent and has been indebted to many persons, firms and corporations in a sum far in excess of his ability to pay, said total indebtedness amounting to the sum of \$2,127,641.86.

VI.

That all of said debts are of long standing, having been incurred during and as a result of the stock market crash of 1929; that a portion of said debts arose by reason of the statutory liability of the petitioner as an officer and director of two national banks.

VII.

That creditors' claims have been filed herein to date in the total sum of \$696,961.53; that the time to file creditors' claims has now expired.

VIII.

That the creditors' claims on file herein are as follows:

1. Logan L. Mullins, Receiver of Madison Square State Bank, in the sum of \$35,811.10;
2. Martin T. O'Brien, Receiver of Reliance Bank [31] and Trust Company, in the sum of \$48,055.70;

3. That the claim of Reconstruction Finance Corporation on file herein in the sum of \$340,566.44, in connection with which litigation is now pending, originally arose approximately eight (8) years ago, and is based upon an alleged guarantee joined in by the petitioner, together with nine (9) other directors of a defaulting bank in Chicago, Illinois, in the original sum of \$210,000.00;

4. That the claim on file herein of Ernest R. Earley, Executor of the estate of Frank Browne Keech, in the sum of \$50,000.00, is a compromised obligation arising out of the said stock market crash;

5. That the claim of Continental Illinois National Bank and Trust Company, on file herein in the sum of \$32,055.70, was incurred on or before July 1, 1935, and was in the original sum of \$23,044.70, the increased amount being for interest accrued thereon;

6. That the claim of W. E. Deming, agent for Eugenia Vollentine, on file herein in the sum of \$168,410.85, and listed for a somewhat larger amount in the Schedule of your petitioner as being the claim of Eugenia A. Vandaveer, is of long standing and represents moneys due by the terms of a property settlement agreement;

7. That the claim of John J. Mitchell, on file herein in the sum of \$8,968.87, and listed in the Schedule of the petitioner on file herein in the sum of \$19,000.00, is a claim of long standing, the exact date of which cannot now be determined;

8. That the claim of Seneca Securities on file herein in the sum of \$13,094.85 and listed in the [32]

Schedule of petitioner on file herein in the sum of \$16,000.00, is an obligation of long standing, the exact date of which cannot at this time be ascertained.

IX.

That the claim of the Reconstruction Finance Corporation, being in the sum of \$340,566.44 as aforesaid, is contingent and is being litigated at present in the Supreme Court of the State of Illinois; that petitioner is informed and believes and therefore alleges the fact to be that in the event said litigation be determined in favor of the Reconstruction Finance Corporation, one or more of the other persons directly liable upon said litigation as aforesaid may be in a financial position to discharge all or a greater portion of said claim.

X.

There are no assets of any kind belonging to the bankrupt, save and except the proceeds of a Buick Convertible automobile, being in the sum of less than \$500.00, and save and except that on or about the 27th day of May, 1941, there was delivered to the above entitled bankrupt estate the sum of \$632.50, being a sum of money claimed by the Trustee in Bankruptcy as belonging to the bankrupt estate.

XI.

That petitioner is indebted to the estate of Pauline D. Rudolph and to Franklin N. Dohn, Charles Dohn, Pauline Dohn, Rudolph Sherman, Herbert N. Butz and John A. Faher, Trustee for Franklin Dohn Rudolph, jointly in the sum of \$827,411.77, which claim is secured by a collateral trust agreement dated the 15th day of February, 1930, in favor of the Chicago Title and Trust Company of Chicago, Illinois as trustee for Pauline D.

Rudolph, by the terms of which petitioner proposed to transfer as collateral security for said indebtedness all of his right, title and inter- [33] est as beneficiary under the Last Will and Testament of his father, Charles Nicolas Strotz, deceased, said Last Will and Testament being dated August 5, 1927, and probated April 30, 1928, in the Superior Court of Cook County, Illinois; that on May 31st, 1940, the creditors named in this paragraph and your petitioner executed an amendment to said Collateral Trust Agreement, wherein and whereby only one-half of petitioner's interest in his said father's estate would be held by said creditors as security for their said joint claim, the other one-half being reserved by the petitioner, provided he be not in default in the performance of the terms and provisions of said amendment dated May 31st, 1940, and wherein and whereby petitioner was given the option to compromise the said entire joint indebtedness for the total sum of \$150,000.00 cash.

XII.

That in connection with the petitioner's indebtedness to the Continental Bank and Trust Company of Chicago, Illinois, in the sum of \$32,055.70, for which a claim has been filed herein as aforesaid, he executed what purports to be an authorization directed to the First National Bank of Chicago, as trustee of the residuary trust estate created under the Last Will and Testament of petitioner's father, Charles Nicolas Strotz, deceased, authorizing said trustee to pay the claim of said Continental Illinois Bank and Trust Company out of any of the assets which your petitioner might be entitled to receive from said residuary trust estate at the time fixed for the distribution of the corpus thereof.

XIII.

That petitioner has arranged to obtain a loan in the sum of \$25,000.00 in cash, which sum he proposes to cause to be paid over to the above bankrupt estate, to be paid to those of his creditors whose claims on file herein will be allowed. That immediately upon the acceptance and approval of this petition said sum of [34] \$25,000.00 in cash will be delivered over to the above named bankrupt estate.

That in addition to the payment of said sum of \$25,000.00, petitioner will execute and deliver to the Trustee in Bankruptcy herein all necessary documents, by the terms of which he will assign to the creditors whose claims have been filed and allowed herein an interest to the extent of ten percent (10%) of any right, title or interest which petitioner may have as beneficiary under the Last Will and Testament of his father's estate, Charles Nicholas Strotz, deceased. Attention is here called to the fact that pursuant to paragraph XII of said Last Will and Testament of petitioner's father, which is a "spendthrift clause" provision, the interest of the petitioner in the estate of his father is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.

It is the intention of the petitioner, in making this offer to his creditors, that any and all proceedings which may now be pending by the Trustee in Bankruptcy herein to set aside any conveyances heretofore made by petitioner, on the ground of fraud or otherwise, be dismissed. This intention is here expressed on the ground that petitioner has entered into no fraudulent conveyance, and that in

making this Arrangement, he desires to settle and compromise all claims of creditors who may have filed their claims herein, as well as any claims of any person or persons who may suffer loss by reason of any proceeding to set aside any conveyance of property made to him or them by your petitioner.

It is also the intention of the petitioner that any assets of the bankrupt estate now in the possession of the Trustee in Bankruptcy as aforesaid be applied upon and not be deemed to be in addition to the sum of \$25,000.00 offered herein. [35]

XIV.

Petitioner presents this Arrangement in good faith without any intention to defraud or deceive his creditors, and this Arrangement is for the best interests of his creditors and is fair, equitable and feasible.

Wherefore, petitioner prays that this petition be referred, pursuant to Section 321 of Chapter XI of the Bankruptcy Act, to a Referee, and that thereafter all proceedings be had in this case, in accordance with the provisions of said Chapter XI of said Bankruptcy Act, and for general relief.

Dated: July 1, 1941.

SIMON & GARBUS

MORTON GARBUS

By Morton Garbus

Attorneys for Petitioner [36]

[Verified.]

[Endorsed]: Filed Jul. 2, 1941 at min. past 10 o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed Jul. 5, 1941. [37]

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR
ARRANGEMENT AS AMENDED.

To the Honorable District Court of the United States,
Southern District of California:

Comes now the bankrupt above named and files this amendment to his amended petition for arrangement under Chapter XI, Section 321, now on file in the above entitled proceeding.

That by the terms of said amended petition for arrangement to which reference is hereby made for full particulars it is provided, among other things, that there be offered to the creditors of this bankruptcy estate cash in the sum of Twenty Five Thousand (\$25,000.00) Dollars to be paid to those of the bankrupt's creditors whose claims, on file herein, will be allowed.

That on the 12th day of November, 1941, there was deposited with the trustee of this bankruptcy estate sufficient cash to allow for the payment of said sum of Twenty Five Thousand (\$25,000.00) Dollars as aforesaid.

That said amended petition for arrangement has been accepted to date by the following creditors of this bankruptcy estate:

Logan L. Mullins, Receiver of Madison	
Square State Bank	\$ 35,811.10
Martin T. O'Brien, Receiver of Reliance	
Bank and Trust Company	48,055.70

Ernest R. Earley, Executor of the Estate of	
Frank Browne Keech	50,000.00
W. E. Deming, Agent for Eugenia Vollen-	
tine	168,410.85
John J. Mitchell	8,968.87
Seneca Securities	13,094.85
	<hr/>
Total	\$324,341.37

That the creditor, Reconstruction Finance Corporation, whose claim is in the sum of \$340,566.44 has not to date approved or accepted said plan of arrangement. [38]

That the creditor, Continental Illinois National Bank and Trust Company, whose claim is in the sum of \$32,055.70 has not to date approved or accepted said plan of arrangement.

That in order to obtain a majority of creditors in number and amount of claims, petitioner hereby amends said amended petition by proposing to cause to be paid over to the above bankrupt estate an additional sum of \$7,000.00 in cash so that the total amount which would be available for distribution to the creditors whose claims are on file herein and allowed will be in the total sum of \$32,000.00; that said additional sum of \$7,000.00 will be paid over to the trustee of the above bankrupt estate forthwith and concurrently with the approval of the arrangement as amended herewith by the above entitled court.

That in addition to the payment of said sum of \$32,000.00, petitioner will execute and deliver to the trustee in bankruptcy herein any and all documents which may be required of him pursuant to said petition for arrangement and particularly pursuant to paragraph XIII of said amended petition; and nothing herein contained shall in any manner be deemed to detract from said amended petition which shall, in all respects, remain in full force and effect save as the offer therein contained is increased by the sum of \$7,000.00 as aforesaid.

Wherefore, petitioner prays that this amendment to said petition for arrangement be filed in the above entitled proceedings and be deemed to amend said amended petition heretofore filed as aforesaid.

Dated: May 27, 1942.

SIMON & GARBUS

By Morton Garbus

Attorneys for Petitioner [39]

[Verified.]

[Endorsed]: Filed May 27, 1942 at 10 min. past 3 o'clock p. m. Ernest R. Utley, Referee; Louise Rodgers, Clerk, g.

[Endorsed]: Filed Jun. 8, 1942. [40]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW

To the Honorable Judges of the Above Entitled Court:

I, Ernest R. Utley, one of the Referees in Bankruptcy of the above entitled Court, do hereby certify that:

The bankrupt herein filed his petition on October 22, 1940, and was adjudicated a bankrupt on October 23, 1940.

A first meeting of creditors was held on the 19th day of November, 1940, and a trustee was elected. On the same day, the bankrupt was examined and thereafter, from time to time, was examined at length under Section 21-A of the Bankruptcy Act.

Thereafter, certain petitions and orders to show cause came on for hearing wherein the trustee was the petitioner and F. J. Ward was the respondent.

On March 7, 1941, specifications of objection to discharge were filed by Reliance Bank & Trust Company and on March 19, 1941, specifications of objection to discharge were filed by Reconstruction Finance Corporation. Prior to a complete hearing and determination thereof and on April 31, 1941, the bankrupt herein filed a plan of arrangement under and pursuant to the provisions of Section 321 of Chapter XI of the Bankruptcy Act.

Thereafter and on July 2, 1941, the bankrupt filed an amended plan of arrangement which creditors rejected and later, and on May 27, 1942, the bankrupt filed an amendment to petition for arrangement as amended, which was accepted by all creditors having provable claims here-

in, except Reconstruction Finance Corporation [41] objected to said plan of arrangement upon the grounds:

1. That the bankrupt had committed certain acts, as indicated in the objections to discharge, which would prevent his discharge in bankruptcy.

2. That the claim of Eugenia Vollentine, a creditor voting for said plan of arrangement, is barred by the statute of limitations and that without said claim there is not a majority in amount in favor of said plan.

At the time of the hearing of said objections, it was stipulated that the Referee take into consideration all evidence offered before him at the first meeting of creditors, the 21-A examinations and all other hearings hereinabove referred to and there was no additional evidence offered.

On August 7, 1942, the undersigned Referee filed his memorandum of opinion wherein he overruled the objections to the second amended plan of arrangement and approved said plan and directed counsel for the trustee to prepare findings of fact, conclusions of law and an order in conformity with said memorandum of opinion.

Between August 7, 1942, and the date on which the findings and order were finally signed, there were certain stipulations between counsel for the bankrupt and counsel for the Reconstruction Finance Corporation as to certain matters of evidence and more particularly, it was stipulated that the claim of the Reconstruction Finance Corporation would not be paid in full from the estate of John L. Cunningham, deceased. Other stipulations referred to are in writing and attached hereto.

Question to Be Determined

The question to be determined is: Did the Referee err in overruling the objections to the plan of arrangement made by the Reconstruction Finance Corporation hereinabove set forth? [42]

Evidence

All of the evidence which counsel for the respective parties stipulated to and which was considered by the Court in determining the issues involved herein, was taken by the court reporter and transcribed and said transcripts will be submitted herewith together with all exhibits introduced in evidence. Since much of the evidence in the transcripts has no particular bearing upon the questions presented by said objections, I do not feel that any useful purpose would be served by repeating in this certificate the evidence offered but I shall leave it to the respective counsel to point out to this Honorable Court such portions of the testimony upon which each rely unless otherwise directed by this Honorable Court. However, it may be helpful to the Court to point out the following:

The bankrupt withdrew, from the account of the estate of Anne Gould Strotz, deceased, the sum of \$11,500.00 on February 26, 1940, as shown by trustee's exhibit number 16 in the matter of Trustee v. F. J. Ward, being a photostatic copy of the bank records of said account. Also the check withdrawing said sum, which is trustee's exhibit number 6 in the matter of Trustee v. F. J. Ward. On the same day that this sum was withdrawn from this bank account in the Security First National Bank of Los

Angeles, the bankrupt secured the following cashiers checks from said bank, payable to the following:

Name of Payee	Amount	Date Cashed
Dr. Frederick Speik	\$1800.00	March 13, 1940
Harold C. Strotz	3600.00	March 3, 1940
(see trustee's exhibit number 22 in the matter of Trustee v. F. J. Ward)		
Guy M. Peters	500.00	March 26, 1940
Bekins Van & Storage Co.	600.00	March 8, 1940
Sidney N. Strotz	3000.00	March 4, 1940
Hamilton Voss, Jr.	500.00	March 21, 1940
Harold C. Strotz	1500.00	Feb. 29, 1940

Total	\$11,500.00
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(see trustee's exhibit number
21 in the matter of Trustee
v. F. J. Ward) [43]

also, in this connection, see the bankrupt's testimony at page 45, line 14 to line 1, page 46; page 46, line 13 to 1, page 47, of the reporter's transcript of April 3rd and 4th, 1941. These checks show the various indorsements thereon and disclose that the checks issued to Guy M. Peters, Sidney N. Strotz, the bankrupt's brother, and Hamilton Voss, Jr., were all cashed in Chicago, Illinois. These cashiers checks account for the total of \$11,500.00 withdrawn from the estate of the bankrupt's wife and the bankrupt's testimony discloses that a number of these checks were issued to creditors. Hamilton Voss, Jr., has a claim on file.

An examination of the bank account carried in the name of F. J. Ward, as shown by trustee's exhibit num-

ber 2 in the matter of Trustee v. F. J. Ward, does not disclose any large deposits in said account at or about the time of this withdrawal except said account does show a deposit of \$3000.00 on March 2, 1940. The only cashiers check issued to the bankrupt and cashed prior to this date was the \$1500.00 check hereinabove referred to. The bankrupt's testimony was to the effect that he may have deposited one or two thousand dollars of this money in the F. J. Ward account but that he cashed this \$11,500.00 check, secured cashiers checks and used the money for the purpose of paying certain creditors, making a trip to New York and Honolulu, and for living expenses.

The bankrupt testified that he opened the bank account in the name of F. J. Ward in 1938 because of the fact that he was being harassed by his former wife, (see lines 9 to 13 inclusive, page 108 reporter's transcript from November 19, 1940 to March 14, 1941) yet, at line 17, page 13 to and including line 2, page 14, reporter's transcript of April 3rd and 4th, 1941, he testified that this particular wife was not listed in his schedules as a creditor. She has filed no claim herein. My attention has been called to no testimony or documentary evidence showing her to be a creditor. All of the bankrupt's obligations, except the obligations owing to [44] his mother and possibly his aunt, both of whom were very friendly, **were** contractual obligations arising in the State of Illinois, payable in the State of Illinois and, therefore, not subject to attachment in California and not subject to a levy of execution because of no existing judgment in the State of California. No creditor, other than those two mentioned, was in a position to levy upon the bankrupt's bank account from the time the account in the name of

F. J. Ward was opened in 1938 until the same was closed. If the bankrupt feared a levy of attachment or execution by any person other than his former wife, no mention is made of such person by name.

Comments by the Referee

My memorandum of decision, attached hereto, generally explains my reasons for arriving at the conclusions reached except that the effect of same may have been changed slightly by the subsequent stipulation of counsel that the claim of Reconstruction Finance Corporation would not be paid in full from the estate of John L. Cunningham, deceased.

The petition for review of Reconstruction Finance Corporation is more in the form of a brief or argument supporting its contentions and contains much matter and argument not proper in a certificate of review. For this reason, I wish to make the following comment:

I note that in this petition for review, counsel for Reconstruction Finance Corporation quotes certain statements made by the Referee during the course of argument on a motion to strike certain testimony. The views expressed by the Referee at the time were expressed in the light of the motion made and then under discussion and were not intended as an expression of what the findings of the Court should be upon the merits of the case. This trial was never concluded due to the filing of the plan of arrangement. In order to permit a witness to be excused, certain testimony was received, subject to a motion to strike, (see page 30, line 26; [45] line 4, page 31, lines 14 to 16 inclusive, page 37; lines 20 to 22 inclusive, page 41; lines 4 to 7 inclusive, page 43; lines

15 to 22 inclusive, page 43; lines 1 to 3 inclusive, page 101; lines 2 and 3, page 107 of reporter's transcript of April 3rd and 4th, 1941) and such a motion was made by counsel. (See page 154 and the discussion that followed) The Referee finally granted the motion in part. (See lines 6 to 11 inclusive, page 174 of reporter's transcript of April 3rd and 4th, 1941) If the entire transcript is read from page 154, the statements of the Referee will appear in an entirely different light from those quoted by counsel for Reconstruction Finance Corporation. However, since I have had an opportunity to study a transcript of the evidence together with the exhibits and documentary evidence, I have come to the conclusion that some of the views expressed by me in connection with the arguments on the motion to strike are not supported by the evidence. For example, it will be observed that I was laboring under the impression at the time that there were creditors who were in a position to attach or levy execution upon the assets of the bankrupt, which clearly is not the case. Furthermore, I stated that I remembered no evidence of the bankrupt having made an effort to pay any creditor. A more careful examination of the evidence shows that creditors did receive payments as shown by cashiers checks.

The following documents are transmitted herewith:

1. Petition and schedules
2. Statement of Affairs
3. Order of Reference and adjudication
4. Amended schedules

(See Clerk's File for documents listed above)

5. Specification of objection to discharge (Reliance Bank and Trust Co.)

6. Petitions for order to show cause directed to F. J. Ward
7. Orders to show cause directed to F. J. Ward [46]
8. Specification of objections to discharge (Reconstruction Finance Corporation)
9. Answer to specification of objection to discharge
10. Petition for arrangement under Chapter XI, Section 321
11. Acceptance of plan by Hamilton Vose, Jr.
12. Objection of Continental Illinois National Bank and Trust Company of Chicago to confirmation of arrangement
13. Surrender of security to bankrupt estate
14. Points and authorities in support of objection
15. Amended petition for arrangement under Chapter XI, Sec. 321
16. Specifications of objections to amended petition for arrangement—Reconstruction Finance Corporation
17. Amendment to petition for arrangement as amended
18. Creditors' consents to arrangement
19. Consent of Continental Illinois National Bank & Trust Co.
20. Points and authorities, memorandum of law (bankrupt)
21. Order disallowing claim of Allan D. Cunningham, executor of the estate of John T. Cunningham, deceased
22. Points and authorities in opposition to confirmation of arrangement and on objections to discharge of bankrupt (Reconstruction Finance Corporation)
23. Additional points and authorities (R. F. C.)

24. Answer to additional points and authorities (bankrupts atty.)
25. Proposed findings of fact, conclusions of law, and order
26. Objections to proposed findings, etc. (R. F. C.)
27. Memorandum of Decision
28. Objections to proposed findings of fact, conclusions of law and order upon objections of R. F. C. to bankrupt's discharge and to claim of Eugenia Vollentine
29. Stipulations re objections to discharge and trustee v. Ward
30. Findings of Fact, conclusions of law and order
31. Petition for extension of time to file petition for review
32. Order for extension of time to file petition for review
33. Petition for review
34. Claim of Eugenia Vollentine [47]
35. Exhibits in the matter of Trustee v. F. J. Ward
36. Reporter's Transcripts of:
 - November 19, 1940 to March 14, 1941
 - April 4, 1941
 - July 20, 1942 and September 29, 1942
 - April 3, 1941 and April 4, 1941
37. Judgment Docket—copy

Respectfully submitted,

ERNEST R. UTLEY

Referee in Bankruptcy

Dated: December 30, 1942

[Endorsed]: Filed Dec. 30, 1942. [48]

[Title of District Court and Cause.]

SPECIFICATION OF OBJECTIONS TO
DISCHARGE

Comes now the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States, and does hereby oppose the granting to said Bankrupt of a discharge from his debts, and specifies as grounds of objection the following:

I.

That said bankrupt has destroyed, mutilated, falsified, concealed, and failed to keep or preserve books of account and records from which the financial condition and business transactions of such bankrupt might be ascertained.

The bankrupt has incurred obligations which he is seeking to discharge totaling \$1,881,830.86, arising out of transactions carried out in different lines of business.

That your objecting creditor is a creditor of said bankrupt as shown by its claim on file herein, and is included in the debts sought to be discharged by said bankrupt. That said bankrupt has heretofore acknowledged that he has destroyed his cancelled checks, and that he has no records of any kind which would indicate the amounts of money and property owned and received by him and the manner in which the same have been disposed of.

II.

That said bankrupt did, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, transfer, remove, destroy and conceal, and permit to be removed, destroyed,

and concealed his property with intent to hinder, delay or defraud his creditors; that some of such acts of transfer, removal, destruction, and concealment are constituted by the following: [53]

A. That said bankrupt did, for the purpose of hindering, delaying, and defrauding his creditors, and putting his property beyond the reach of creditors, cause to be opened and maintained a bank account in the name of F. J. Ward, in which bank account there was concealed sums of money averaging in excesss of Two Thousand Dollars (\$2,000.00).

B. That said bankrupt caused to be transferred moneys belonging to him, to a bank account in the name of F. J. Ward, with intent to hinder, defraud and delay his creditors, all within twelve months preceding the filing of the petition in bankruptcy herein.

C. That said bankrupt caused to be transferred to F. J. Ward one-half of a 7-1/3% overriding royalty interest in the lease known as the "Long Beach Harbor Lease of the Interstate Investment Corporation," and which lease was acquired by the Interstate Investment Corporation under an agreement with the General Petroleum Corporation of California, and is part of a lease dated December 29, 1936, held by the General Petroleum Corporation of California in certain property located in the Rancho Los Cerritos in the Wilmington Oil Field, Long Beach, California; that said transfer was made within one year preceding the filing of the bankruptcy petition herein.

D. That said bankrupt, with intent to hinder, delay and defraud his creditors, caused one-half of a 7-1/3% overriding royalty to be concealed in the name of F. J. Ward, all as more particularly set forth in the preceding Paragraph II (C).

E. That said bankrupt caused to be transferred to F. J. Ward a royalty interest in "Abel Well No. 2" with intent to hinder, delay and defraud his creditors; and that such transfer took place within one year of the filing of the bankruptcy petition herein.

F. That said bankrupt caused to be concealed in the name of F. J. Ward the royalty described in the preceding sub-paragraph II (E), with intent to hinder, delay and defraud his creditors; and such concealment continued to within one year of the filing of these bankruptcy proceedings. [54]

G. That said bankrupt caused to be transferred to one Spencer H. Logan, two thousand shares of stock of the Beach Petroleum Company and a promissory note in the sum of \$320.00, with intent to hinder, delay, and defraud his creditors; and that such transfer was made within one year preceding the filing of the petition in bankruptcy herein.

H. That said bankrupt caused to be concealed in the name of said Spencer H. Logan, two thousand shares of stock of the Beach Petroleum Company, and a promissory note of the Beach Petroleum Company for the sum of \$320.00, with intent to hinder, delay and defraud his

creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

I. That said bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00, which he withdrew from the bank account of the Estate of Anne Gould Strotz, his deceased wife, for the purpose of putting the same beyond the reach of creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

J. That said bankrupt, within one year preceding the filing of the bankruptcy petition herein, failed to file any inventory and appraisalment in the Estate of Anne Gould Strotz, deceased, pending in the Superior Court of Los Angeles County, for the purpose of concealing from his creditors the fact that there were assets in said estate, and the fact that his interest in said estate was of some value, all with intent to hinder, delay and defraud his creditors; and failed to file an inventory in said estate until after he had appropriated and disposed of, to his own use and benefit, moneys and property to which he was entitled as the heir of said estate.

K. That said bankrupt, with intent to hinder, delay and defraud his creditors, caused to be concealed certain assets in the name of Jay Gould; and that such concealment took place and continued to within one year of the filing of the petition in bankruptcy. [55]

III.

That said bankrupt failed to explain satisfactorily losses of assets and deficiency of assets to meet his liabilities by not giving full particulars in the following respects:

Said bankrupt has caused to be incurred liabilities totaling \$1,881,830.86, and has failed to explain how he incurred such loss and has failed to explain what disposition he has made of his assets, such as moneys received by him from the estate of his deceased wife, moneys received by him from his mother, and from other sources.

IV.

That said Interstate Investment Corporation claims no interest in said 7-1/3% overriding royalty, but is merely a stakeholder receiving the money for the purpose of distributing it in accordance with the agreements hereinabove referred to.

Wherefore, your objector prays that an order be made denying the bankrupt a discharge.

RECONSTRUCTION FINANCE CORPORATION

By HECTOR C. HAIGHT

Objector

J. J. LIEBERMAN and RAPHAEL DECHTER

By R. Dechter

Attorneys for Objector.

[Verified.]

[Endorsed]: Filed Mar. 19, 1941 at 30 min. past 3 o'clock p. m. Ernest R. Utley, Referee; Meredith Keith, Clerk.

[Endorsed]: Filed Dec. 30, 1942. [56]

[Title of District Court and Cause.]

ANSWER TO SPECIFICATION OF OBJECTION
TO DISCHARGE

Comes now Harold C. Strotz, the bankrupt above named, and answering the specification of objection to discharge filed herein by Martin T. O'Brien, as Receiver for Reliance Bank & Trust Company of Chicago, Illinois; E. A. Lynch, as trustee in bankruptcy of the above named bankrupt; and John J. Mitchell and Seneca Securities Corporation, and admits, denies and alleges as follows:

I.

Answering Paragraph I thereof, denies each and every, all and singular, generally and specifically the allegations in said paragraph contained, save as herein otherwise admitted.

II.

Further answering said Paragraph I, he alleges that he is seeking a discharge of obligations totalling \$2,127,641.86.

III.

Further answering said Paragraph I, he admits that the objecting creditors are creditors of said bankrupt, as shown by the Schedules and their claims on file herein, and are included in the debts sought to be discharged by said bankrupt, and admits that he has destroyed certain cancelled checks having no bearing upon the matters here involved and without any intention to conceal assets or hinder, delay or defraud creditors or any of them.

IV.

Answering Paragraph II thereof, denies each and every, all and singular, generally and specifically, the allegations therein and in the subdivisions thereof contained.

V.

Answering Paragraph III, denies each and every, all and singular. [57] generally and specifically, the allegations therein contained, save as herein otherwise admitted.

VI.

Further answering said Paragraph III, he admits that he caused to be incurred, liabilities totalling \$2,127,641.86, but denies that he has failed to explain how he incurred such liabilities, or how the same were disposed *or* and/or lost, and denies that he has failed to explain what disposition he made of his assets, such as moneys received by him from the estate of his deceased wife, moneys received by him from his mother, and/or from other sources.

Wherefore, the bankrupt prays that the objections to his discharge be denied, and that he may be discharged from his said debts as prayed for in his petition on file herein, and for such other and further relief as may be proper in the premises.

SIMON & GARBUS

By Morton Garbus

Attorneys for Bankrupt.

[Verified.]

[Endorsed]: Filed Mar. 21, 1941 at min. past 10
o'clock a. m. Ernest R. Utley, Referee; Meredith Keith,
Clerk.

[Endorsed]: Filed Dec. 30, 1942. [58]

[Title of District Court and Cause.]

SPECIFICATIONS OF OBJECTIONS TO AMENDED PETITION FOR ARRANGEMENT UNDER CHAPTER XI, SECTION 321

Comes now the Reconstruction Finance Corporation, a corporation organized and existing under and by virtue of the laws of the United States and does hereby oppose and object to the Amended Petition for Arrangement Under Chapter XI, Section 321, filed herein by the Bankrupt, and specifies as grounds of objection the following:

I.

That said proposed Arrangement is not for the best interests of the Creditor.

II.

That said proposed Arrangement is not fair and/or equitable and/or feasible.

III.

That said Debtor, Harold C. Strotz, has been guilty of the following acts which would be a bar to the discharge of a Bankrupt:

1.

That said Bankrupt has destroyed, mutilated, falsified, concealed, and failed to keep or preserve books of account and records from which the financial condition and business transactions of such Bankrupt might be ascertained.

The Bankrupt has incurred obligations which he is seeking to discharge totaling \$1,881,830.86, arising out of transactions carried out in different lines of business.

That your objecting creditor is a creditor of said Bankrupt as shown by its claim on file herein, and is included in the debts sought to be discharged by said Bankrupt. That said Bankrupt has heretofore acknowledged that he

has destroyed his cancelled checks, and that he has no records of any kind which would indicate the amounts of money [61] and property owned and received by him and the manner in which the same have been disposed of.

2.

That said Bankrupt did, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, transfer, remove, destroy and conceal, and permit to be removed, destroyed, and concealed his property with intent to hinder, delay or defraud his creditors; that some of such acts of transfer, removal, destruction, and concealment are constituted by the following:

A. That said Bankrupt did, for the purpose of hindering, delaying, and defrauding his creditors, and putting his property beyond the reach of creditors, cause to be opened and maintained a bank account in the name of F. J. Ward, in which bank account there was concealed sums of money averaging in excess of Two Thousand Dollars (\$2,000.00).

B. That said Bankrupt caused to be transferred moneys belonging to him, to a bank account in the name of F. J. Ward, with intent to hinder, defraud and delay his creditors, all within twelve months preceding the filing of the petition in bankruptcy herein.

C. That said Bankrupt caused to be transferred to F. J. Ward one-half of a 7-1/3% overriding royalty interest in the lease known as the "Long Beach Harbor Lease of the Interstate Investment Corporation," and which lease was acquired by the Interstate Investment Corporation under an agreement with the General Petroleum Corporation of California, and is part of a lease dated December 29, 1936, held by the General Petroleum

Corporation of California in certain property located in the Rancho Los Cerritos in the Wilmington Oil Field, Long Beach, California; that said transfer was made within one year preceding the filing of the bankruptcy petition herein.

D. That said bankrupt, with intent to hinder, delay and defraud his creditors, caused one-half of a 7-1/3% overriding royalty to be concealed in the name of F. J. Ward, all as more particularly set forth in the preceding Paragraph 2 (C). [62]

E. That said Bankrupt caused to be transferred to F. J. Ward a royalty interest in "Abel Well No. 2" with intent to hinder, delay and defraud his creditors; and that such transfer took place within one year of the filing of the bankruptcy petition herein.

F. That said Bankrupt caused to be concealed in the name of F. J. Ward the royalty described in the preceding sub-paragraph 2 (E), with intent to hinder, delay and defraud his creditors; and such concealment continued to within one year of the filing of these bankruptcy proceedings.

G. That said Bankrupt caused to be transferred to one Spencer H. Logan, two thousand shares of stock of the Beach Petroleum Company and a promissory note in the sum of \$320.00, with intent to hinder, delay, and defraud his creditors; and that such transfer was made within one year preceding the filing of the petition in bankruptcy herein.

H. That said Bankrupt caused to be concealed in the name of said Spencer H. Logan, two thousand shares of stock of the Beach Petroleum Company, and a promissory note of the Beach Petroleum Company for the sum of

\$320.00, with intent to hinder, delay and defraud his creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

I. That said Bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00, which he withdrew from the bank account of the Estate of Anne Gould Strotz, his deceased wife, for the purpose of putting the same beyond the reach of creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

J. That said bankrupt, within one year preceding the filing of the bankruptcy petition herein, failed to file any inventory and appraisal in the Estate of Anne Gould Strotz, deceased, pending in the Superior Court of Los Angeles County, for the purpose of concealing from his creditors the fact that there were assets in said estate, and the fact [63] that his interest in said estate was of some value, all with intent to hinder, delay and defraud his creditors; and failed to file an inventory in said estate until after he had appropriated and disposed of, to his own use and benefit, moneys and property to which he was entitled as the heir of said estate.

K. That said Bankrupt, with intent to hinder, delay and defraud his creditors, caused to be concealed certain assets in the name of Jay Gould; and that such concealment took place and continued to within one year of the filing of the petition in bankruptcy.

3.

That said Bankrupt failed to explain satisfactorily losses of assets and deficiency of assets to meet his liabilities by not giving full particulars in the following respects:

Said Bankrupt has caused to be incurred liabilities totaling \$1,881,830.86, and has failed to explain how he incurred such loss and has failed to explain what disposition he has made of his assets, such as moneys received by him from the estate of his deceased wife, moneys received by him from his mother, and from other sources.

4.

That said Interstate Investment Corporation claims no interest in said 7-1/3% overriding royalty, but is merely a stakeholder receiving money for the purpose of distributing it in accordance with the agreements hereinabove referred to.

IV.

That the proposed arrangement is not a proper proceeding under Chapter XI of the Bankruptcy Act, said chapter not being applicable to cases involving and affecting secured as well as unsecured creditors.

Wherefore, your objector prays that the confirmation of this proposed Arrangement be refused and that an order be made dismissing the proceeding under this chapter.

RECONSTRUCTION FINANCE CORPORATION

By HECTOR C. HAIGHT
Objector

Jacob J. Lieberman

Attorney for Objector. [64]

[Verified.]

[Endorsed]: Filed Aug. 25, 1941 at 20 min. past 11 o'clock a. m. Ernest R. Utley, Referee; Meredith Keith, Clerk.

[Endorsed]: Filed Dec. 30, 1942. [65]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Re: Objections to Discharge Trustee vs. F. J. Ward
Meeting of Creditors as Required by Sec. 334

Appearances:

Raphael Dechter, Esq. and George T. Goggin, Esq., for the Trustee, E. A. Lynch.

Messrs. Simon and Garbus, by Morton Garbus, Esq., for the Bankrupt.

Messrs. H. L. Wyatt, H. F. Clary and Wm. J. Curren, Jr., for Certain Creditors.

Frank A. Pettibone, Esq., and J. J. Lieberman, Esq., for Reconstruction Finance Corporation.

Earl E. Moss, Esq., for F. J. Ward.

The principal question here for determination is whether or not the plan of arrangement filed herein, under and pursuant to Section 321 of Chapter XI of the Bankruptcy Act, should be approved in the face of an objection by the Reconstruction Finance Corporation (who is the largest creditor herein and whose claim totals in excess of \$340,000.00) that the bankrupt has committed an act which would bar his discharge in bankruptcy and that the claim of one of the creditors voting for the plan of arrangement is barred by the statute of limitations and that without such claim, there will not be a majority in amount in favor of the plan of arrangement. All creditors have voted in favor of the plan of arrangement with the exception of the Reconstruction Finance Corporation.

The facts briefly are as follows:

The bankrupt herein filed his petition and schedules on October 22, 1940, and was adjudicated a bankrupt the

following day. The bankrupt, in his schedules, lists a total indebtedness of \$1,881,830.86. Practically all of the obligations owed by the bankrupt grew out of the 1929 stock market crash and a large portion of this indebtedness arose [76] by reason of statutory liability of the bankrupt as an officer and director of national banks in Chicago.

The bankrupt is a son of Charles Nicolas Strotz, deceased, who left a large estate to his wife, Clara A. Strotz, who is still living. The bankrupt owns a contingent interest in the trust estate of his father, payable to the bankrupt in the event he should survive his mother and not otherwise. Said interest is also limited by reason of a spendthrift trust clause contained in the last will and testament of the bankrupt's father, to provide that the interest of the bankrupt in his father's estate, contingent as aforesaid, is not subject to the claims of creditors, nor shall the bankrupt have the right to anticipate, assign or encumber his interest in the income or principal of said estate. This will was probated in Cook County, Illinois, on April 30, 1928.

At the first meeting of creditors on November 19, 1940, the bankrupt was examined at length and has subsequently been examined upon numerous occasions by the trustees and creditors in an endeavor to uncover assets in this estate. As will be seen, this case started as a straight bankruptcy case and after examination of the bankrupt at the first meeting of creditors and numerous 21-A examinations, the trustee herein filed a petition against one F. J. Ward, seeking to recover certain oil properties and interest therein from Ward upon the theory that this property was concealed assets of the bankrupt. This matter has been tried and submitted for

decision. This same transaction is set forth as one of the grounds of objection to the bankrupt's discharge. I do not feel that the evidence offered by the trustee, in support of his petition, is sufficient to warrant a finding in his favor. Therefore, the petition is denied and it must necessarily follow that the objections to the discharge of the bankrupt, based upon the same ground, cannot be sustained.

While the obligations alleged by the bankrupt to be owing by him amount to almost two million dollars, yet there are only eleven claims filed herein within the time allowed for the filing of claims. The [77] total amount thereof is \$974,848.64. The claim of the Estate of John T. Cunningham, deceased, which was filed in the sum of \$245,811.25, was disallowed, therefore the claims which will participate in any plan of arrangement total \$729,037.39.

As time went on in these proceedings, there were numerous objections filed to the bankrupt's discharge, seeking a denial of the bankrupt's discharge upon numerous grounds, including the concealment and transfer of assets within one year preceding bankruptcy with intent to hinder, delay and defraud creditors of the bankrupt.

In 1935, the bankrupt herein married Anne Gould (former wife of Jay Gould) and Anne Gould Strotz died on September 13, 1938, leaving an estate to the bankrupt. Among the various specifications of objections to the bankrupt's discharge are the following:

"That said bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00, which he withdrew

from the bank account of the Estate of Anne Gould Strotz, his deceased wife, for the purpose of putting the same beyond the reach of creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein."

As another ground of objection it is alleged:

"That said Bankrupt did, for the purpose of hindering, delaying, and defrauding his creditors, and putting his property beyond the reach of creditors, cause to be opened and maintained a bank account in the name of F. J. Ward, in which bank account there was concealed sums of money averaging in excess of Two Thousand Dollars (\$2,000.00).

That said Bankrupt caused to be transferred moneys belonging to him, to a bank account in the name of F. J. Ward, with intent to hinder, defraud and delay his creditors, all within twelve months preceding the filing of the petition in bankruptcy herein."

Before said objections to discharge were fully heard and on April 30, 1941, the bankrupt herein filed a petition for arrangement under and pursuant to Section 321, Chapter XI of the Bankruptcy Act, which plan of arrangement was promptly turned down by creditors, therefore, it is not necessary to mention its contents. On July 2, 1941, the bankrupt filed an amended plan of arrangement in which he states, among other things, that he had secured a loan of \$25,000.00 from his stepson, J. Gould, Jr., which he proposed to turn over to the trustee in bankruptcy if his plan [78] of arrangement were approved. He did not secure the consent of the majority of creditors in number and amount to this plan

of arrangement. Subsequently he secured another loan from his stepson, raising the total to \$32,000.00, which he now offers and which all creditors, whose claims have been proved and allowed, except the Reconstruction Finance Corporation, have accepted.

While it is true that the bankrupt herein, for the past several years, has not kept a very good set of books, and this is alleged as one of the grounds of objection to his discharge, yet I think that under all the circumstances of this case, his failure to have done so is justified.

The only grounds for objection to the bankrupt's discharge, which cause the Court any difficulty in the light of the evidence offered, arise from those objections herein which have to do with the bankrupt carrying a bank account in the name of F. J. Ward and the withdrawal of the sum of \$11,500.00 from his former wife's estate. While the transcript discloses rather strong evidence pointing to a possible concealment of this money, yet there is other evidence which strongly indicates to the contrary. In determining the intent and purpose of the bankrupt in carrying this bank account in the name of F. J. Ward, the Court cannot overlook the fact that this bank account was opened as early as 1938 and was very active through the year 1939, and it seems to have been closed in August, 1940. All creditors of the bankrupt excepting his mother and aunt, both of whom were very friendly to the bankrupt and neither of whom have filed claims herein, lived outside of the state and their claims were based either upon promissory notes or judgments in the State of Illinois so that said creditors were without power to attach or levy upon any property of the bankrupt located in this state under and pursuant to the attachment laws of the

State of California which provide, in substance, among other things, that a plaintiff in an action may attach the property of a defendant as security for the satisfaction of any judgment that may be recovered, if the [79] cause of action is based upon a contract, express or implied, for the direct payment of money where the contract is made or is payable in this state, and is not secured by any mortgage, etc.

The evidence does not disclose that any judgment was rendered in this state upon any of the obligations of the bankrupt until September, 1940, and within approximately one month preceding the filing of the bankruptcy petition. Also, the withdrawal of the \$11,500.00 from the estate of Mrs. Strotz was on February 26, 1940, months before any creditor of the bankrupt was in a position to tie up any of his property in the State of California either by way of attachment or levy of execution. Furthermore, it should not be overlooked that in order for a transfer or concealment of property within one year preceding bankruptcy to be a proper ground of objection to a bankrupt's discharge, such transfer or concealment of property must be done with intent to defraud the creditors of the bankrupt. I do not construe this section to mean that a person who conceals property from someone whom he honestly does not believe to be a legitimate creditor, subjects himself to the charge of concealment of assets as contemplated by the provisions of Section 14-c of subdivision 4 of the Bankruptcy Act. While the evidence does disclose that the bankrupt may have had some concern about certain individuals, there is no showing here that they were in fact creditors of the bankrupt. The evidence also discloses that much of the money involved was used to satisfy claims of creditors. While the pay-

ment of money to a creditor might be made in such a way as to constitute a voidable preference, such a transaction is distinguishable from a concealment of assets. The following facts in this case impress the Court:

Every creditor in the estate, with the exception of the Reconstruction Finance Corporation, who has a provable and allowable claim herein, has recommended the approval of the plan. Unless creditors herein receive the benefit of the \$32,000.00, which the bankrupt has borrowed from his stepson, they will not receive any dividends herein. This [80] \$32,000.00 will be returned to Mr. Gould if the plan is not approved and accepted. These creditors, who have recommended the plan, undoubtedly realize that this amount of money is more than the total amount of money handled through the bank account, plus the \$11,500.00 which the bankrupt received from his former wife's estate. It has not been satisfactorily established by the evidence that had the bankrupt preserved all of his earnings and other property coming into his possession for creditors, after allowing himself a reasonable amount for living expenses, he would have had this amount of money on hand for creditors.

The evidence before the Court discloses that the Reconstruction Finance Corporation has co-signers on the obligation against the bankrupt herein, one being the Estate of John T. Cunningham, deceased, which is financially responsible and will be compelled to pay the claim of the Reconstruction Finance Corporation in full, whether it receives a dividend from this estate or not. The Estate of John T. Cunningham, deceased, has filed a claim herein, based upon this transaction, but its claim has been denied upon the ground that it did not have a

provable claim in bankruptcy. If this co-signer is required to pay this obligation, it will have a lesser amount to pay if a dividend is paid to the Reconstruction Finance Corporation. Therefore, under all the circumstances, I am unable to see whether the Reconstruction Finance Corporation will be damaged in any way by the approval of this plan.

The purpose of a denial of a discharge in bankruptcy, as I understand it, is to penalize the bankrupt and not creditors and to adopt the view of the Reconstruction Finance Corporation herein would, as I view it, be penalizing creditors far more than it would the bankrupt. The bankrupt is a man not far from fifty years of age and the probabilities of the bankrupt accumulating an estate in the future, upon which creditors could reap more than will be paid them under this plan, is extremely remote. In any event, all creditors who will not otherwise be paid in full, have recommended the approval of the plan. Under all the circumstances of the case, I do not feel that the evidence estab- [81] lishes a clear and convincing case of fraudulent concealment of assets as contemplated by Section 14-c of the Bankruptcy Act.

The objections to the bankrupt's discharge are overruled and the discharge of the bankrupt is granted.

Having so held in the matter of the objections to discharge, to adopt the contention of the objecting creditor that the plan cannot be approved because the claim of one of the creditors herein, voting for the plan, is barred by the statute of limitations and without said claim there is not a majority in amount in favor of the plan, would certainly be a slap in the face to all other creditors and

would deprive the very objector of a valuable right. The bankrupt has offered this money for his creditors—all of his creditors, who have no other source from which they can collect their claims, desire that the plan be approved. I would not attempt to deprive them of this valuable right. The nature of the objections involving the statute of limitations is this:—A note was given this creditor in Chicago, Illinois, where the statute of limitations upon a promissory note seems to be ten years. In California, the statute of limitations upon a promissory note is four years. The bankrupt had lived in California a little more than four years before filing his petition in bankruptcy. It is the contention of the objecting creditor that the statute of limitations of California applies and not that of Illinois. The four year period has run in California, but the ten year period has not run in Illinois.

The objections are overruled and the plan of arrangement is confirmed.

Counsel for the trustee is directed to prepare an appropriate order in conformity with this memorandum of decision.

Dated: August 7, 1942.

ERNEST R. UTLEY

Referee in Bankruptcy.

[Endorsed]: Filed Aug. 7, 1942 at 30 min. past 4 o'clock p. m. Ernest R. Utley, Referee; Louise Rodgers, Clerk, M.

[Endorsed]: Filed Dec. 30, 1942. [82]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

The hearing on the bankrupt's amended plan of arrangement came on before the Honorable Ernest R. Utley, Referee in Bankruptcy, on the 22nd day of July, 1941, and was partially heard or continued to August 7, 1941, August 26, 1941, September 29, 1941, November 26, 1941, January 13, 1942, February 17, 1942, March 18, 1942, May 27, 1942, June 8, 1942, and July 20, 1942, the Trustee, E. A. Lynch, appearing by his attorney, Raphael Dechter; the bankrupt appearing by his attorneys, Simon & Garbus, by Morton Garbus; Reconstruction Finance Corporation, a creditor, appearing by its attorneys Frank A. Pettibone and J. J. Lieberman; F. J. Ward appearing by his attorney, Earl E. Moss; Continental Illinois National Bank and Trust Company of Chicago appearing by its attorney, Paul E. Iverson; and certain other creditors appearing by Messrs. Harold L. Watt, Harold F. Clary and Wm. J. Currer, Jr., and Grainger & Hunt, by Kyle K. Grainger, attorneys for such creditors; and evidence being heard on the objections of the Reconstruction Finance Corporation that the plan of arrangement should not be approved because (1) the bankrupt had committed an act which would bar his discharge in bankruptcy, and (2) the claim of one creditor voting for the plan of arrangement is barred by the statute of limitations and without such claim there would not be a majority

in favor of the plan; and evidence, both oral and written, having been introduced; and arguments having been heard, the Court renders this its Findings of Fact, Conclusions of Law, and Order based thereon, as follows:

Findings of Fact

1. That on October 22, 1940, the bankrupt herein filed a voluntary petition in bankruptcy, together with schedules attached, and on October 23, 1940, the said bankrupt was adjudicated a bankrupt. [83]

2. Schedules of the bankrupt reflect a total indebtedness of the bankrupt in the amount of \$1,881,830.86. That practically all of said indebtedness resulted from financial reverses suffered by the bankrupt as a result of the stock market crash in 1929, and a large portion of such indebtedness is the result of statutory liability of the bankrupt as an officer and director of certain national banks in Chicago, Illinois.

3. The bankrupt is the son of one Charles Nicholas Strotz, deceased, who left an estate of considerable size to his wife, Clara A. Strotz, which was probated in Cook County, Illinois. The will of this deceased created a trust estate in which the bankrupt has a contingent interest, which is payable to the bankrupt in the event only that he should survive his mother, who is living. The said interest of the bankrupt is limited also by a spendthrift clause contained in the last will and testament of the bankrupt's father, which provides that the interest of the bankrupt in his father's estate is not subject to the claims

of creditors, nor shall the bankrupt have the right to anticipate, assign or encumber his interest in the income or principal of said estate.

4. A first meeting of creditors of the bankrupt was held on November 19, 1940, as well as subsequent meetings, at which the bankrupt was examined at great length. The bankrupt has been examined on numerous occasions by the Trustee and his attorneys, and by creditors, in an endeavor to uncover assets in this estate.

5. The total number of claims filed herein within the time allowed for the filing of claims amount to \$974,848.64. The claim of the estate of John T. Cunningham in the amount of \$245,811.25 has been previously disallowed, and the total amount of the claims which will participate in any plan of arrangement is \$729,037.39.

6. The Reconstruction Finance Corporation, in objecting to the amended plan, for one of its grounds to objections has set forth that the bankrupt had transferred certain oil properties to one F. J. Ward and that said property constituted assets of the bankrupt which were concealed from his creditors. A petition has been filed by the Trustee [84] against the said F. J. Ward for the purpose of recovering such oil properties and interests, which petition is based upon the theory that the property constitutes concealed assets of the bankrupt. This matter has been tried and submitted to this Court for decision. The Court finds that said transfer from the bankrupt to F. J. Ward was not fraudulent and was not made with intent to hinder, delay and defraud the creditors of the bankrupt.

7. The Court finds that it is not true that said bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00.

8. The Court finds that it is not true that said bankrupt did, for the purpose of hindering, delaying and defrauding his creditors, or for the purpose of putting his property beyond the reach of the creditors, cause to be opened and maintained a bank account in the name of F. J. Ward; that it is not true that said bankrupt caused to be transferred moneys belonging to him to a bank account in the name of F. J. Ward, with intent to hinder, delay and defraud his creditors, within the twelve months preceding the filing of the petition in bankruptcy herein.

9. The Court finds that at all times herein, the bankrupt conducted himself in such a manner as was inconsistent with an intent to hinder, delay or defraud his creditors. The evidence discloses that the bankrupt made every effort to pay such creditors as he deemed to be legitimate, and made no effort to conceal any of his assets from any creditor whom he honestly believed was his creditor.

10. The Court finds that it is true that the bankrupt has failed to keep books of account or records from which his financial condition and business transactions might be ascertained, but this Court deems that such failure is justified under all the circumstances of the case, and particularly in view of the fact that the bankrupt for many years prior to the filing of the petition in bankruptcy was not engaged in any particular line of business and that the transactions carried on by him were not

such as to require the keeping of a set of books or records. [85]

11. The Court finds that it is not true that the bankrupt caused to be transferred to one Spencer H. Logan two thousand shares of Beach Petroleum Company stock and a promissory note in the sum of \$320.00, with intent to hinder, delay and defraud his creditors, or that such transfer was made within one year preceding the filing of the petition in bankruptcy herein.

12. The Court finds that the failure of the bankrupt to file any inventory and appraisalment in the estate of Anne Gould Strotz, deceased, in the Superior Court of Los Angeles County, was not by reason of any intent on the part of the bankrupt to hinder, delay and defraud his creditors.

13. That it is not true that the bankrupt caused any assets to be concealed in the name of Jay Gould, Jr., within one year prior to the filing of the petition in bankruptcy, with intent to hinder, delay and defraud his creditors.

14. That among the objections to the discharge of the bankrupt was the allegation that he had failed to explain satisfactorily losses of assets and deficiency of assets to meet his liabilities in that he had failed to explain how he had incurred liabilities totaling \$1,881,830.86 and what disposition he had made of his assets, such as moneys received by him from the estate of his deceased wife, from his mother, and from other sources. The Court finds that the liabilities of the bankrupt have been satisfactorily explained as financial reverses incurred in the stock market crash of 1929. The Court finds that the evidence is in-

sufficient to warrant the conclusion that the bankrupt has not satisfactorily explained the disposition of moneys received by him from the estate of his deceased wife, from his mother, and from other sources.

15. The Court finds that every creditor who has a provable and allowable claim herein, has recommended the approval of the plan submitted by the bankrupt whereunder the creditors would receive \$32,000.00 which the bankrupt has borrowed from his step-son, except that the Reconstruction Finance Corporation alone has objected to the approval of said plan. The Court finds that the Reconstruction Finance Corporation has other [86] means of realization of its claim against the bankrupt herein, one of the co-signers of said obligation being the estate of John T. Cunningham, deceased, which is financially responsible and which will be compelled to pay the claim of the Reconstruction Finance Corporation in full, irrespective of the outcome of this proceeding. The estate of John T. Cunningham, deceased, has filed a claim herein, but its claim has been denied upon the ground that it does not constitute a provable claim in bankruptcy. The Court finds that the Reconstruction Finance Corporation is amply assured of receiving payment in full of its claim and will not be affected by the plan, whether approved or not. The Court finds that there has been no sufficient evidence to warrant the denial of the discharge of the bankrupt. The Reconstruction Finance Corporation objects to the approval of the plan on the ground that a majority of the creditors have not approved the same, and as the basis of said contention maintains that the claim of one of the creditors herein voting for the plan, to-wit, that of Eugenia Vollentine, is barred

by the statute of limitations, and if disallowed on said ground there is not a majority in amount in favor of the plan. The Court finds that the note of the bankrupt held by said Eugenia Vollentine was given to her in Chicago, Illinois, and that the statute of limitations upon a promissory note in Illinois is ten years. The Court finds that the parties to such transaction intended to be governed by the laws of the State of Illinois wherein the transaction took place, and that under the statute of limitations of Illinois (which is applicable herein) the right of action on said promissory note has not been barred by the statute of limitations.

16. The Court finds that the claim of the Continental Illinois National Bank and Trust Company of Chicago is that of an unsecured, general creditor.

Based Upon the Foregoing Findings of Fact, the Court Makes Its Conclusions of Law:

1. The Court concludes that the evidence introduced in support of [87] the objections to the discharge of the bankrupt is insufficient to warrant denial of the bankrupt's discharge, and such objections are therefore not grounds for the refusal by this Court of approval of a plan which appears to be for the best interests of the creditors herein.

2. The Court concludes that a majority of the creditors in number and amount have duly approved the proposed plan, and the plan appearing to be fair and reasonable and for the best interests of the creditors, the same should be approved by the Court.

3. The Court concludes that the sole creditor objecting to the approval of the plan is not entitled to bar the

approval of the plan in view of the fact that the approval of the plan would not affect said creditor, there appearing to be co-obligators on said indebtedness from whom said claimant will receive satisfaction in full.

Based upon said Findings of Fact and *Conclusion of Law*,

It Is Ordered that the amended plan of the bankrupt herein be and the same is hereby approved; that the sum of \$32,000.00 offered in the plan be declared assets of the above estate, subject to distribution to creditors whose claims have been filed and allowed herein, after deducting therefrom such sums as the Court may fix and allow and order paid as fees, costs and expenses of administration; that Harold C. Strotz, as debtor, be released and discharged from the claims of indebtedness scheduled by him herein; that the funds heretofore received by the Trustee in connection with the litigation against F. J. Ward be surrendered to F. J. Ward; that any and all other moneys or assets remaining at this time in the possession of the Trustee, other than said sum of \$32,000.00, be released to the bankrupt and debtor herein; that the Trustee be and he hereby is directed to dismiss the action heretofore commenced against Spencer H. Logan, as well as any other proceedings that may be pending, heretofore instituted by the Trustee.

Dated this day of September, 1942.

Referee in Bankruptcy.

[Endorsed]: Filed Sep. 17, 1942 at min. past 5
o'clock p. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk. C.

[Endorsed]: Filed Dec. 30, 1942. [88]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND OR-
DER, AND PETITION FOR REOPENING OF
HEARINGS FOR SUBMISSION OF ADDI-
TIONAL TESTIMONY

Comes now Reconstruction Finance Corporation, a claimant in the above entitled matter by its attorneys, Jacob J. Lieberman and Frank A. Pettibone, and

Objects to the Findings of Fact, Conclusions of Law, and Order in the following respects and upon the grounds hereinafter set forth:

I.

1. Objects to that portion of Finding No. 2 reading: "That practically all of said indebtedness resulted from financial reverses suffered by the bankrupt as a result of the stock market crash in 1929, and a large portion of such indebtedness is the result of statutory liability of the bankrupt as an officer and director of certain national banks in Chicago, Illinois," for the reason and upon the ground that same is irrelevant, incompetent and immaterial, and because the facts are and said Findings are inaccurate and incomplete, unless they show the facts to be that the claim of Reconstruction Finance Corporation is based upon a note, dated August 12, 1930, signed by the bankrupt and others for the sum of Two hundred ten thousand and 00/100 Dollars (\$210,000.00), upon which note the bankrupt and said others received from the National Bank of the Republic of Chicago, Illinois, the payee of the note, a check for Two hundred ten thousand and

00/100 Dollars (\$210,000.00), which check was used by the bankrupt and said other signers of the note to purchase certain slow assets of the Madison Square Bank of which the signers of the note were then directors.

2. Objects to Finding No. 3 because same is incomplete, unless same show that bankrupt's mother, who is living, is over the age of seventy, and that from said trust said mother of bankrupt is to receive the income for life, and upon her death, the corpus thereof is to be distributed in [89] equal shares to the three children of said testator, of whom bankrupt is one.

3. Objects to Finding No. 7 for the reason that said Finding should show and find that bankrupt concealed the sum of Eleven thousand, five hundred and 00/100 Dollars (\$11,500.00), although Referee finds that such concealment was not for the purpose of hindering, delaying and defrauding his creditors. As the Finding reads now, it would appear to be a Finding that the said Eleven thousand, five hundred and 00/100 Dollars (\$11,500.00) was not even concealed.

4. Objects to Finding No. 8, unless same be so worded as to find that bankrupt caused moneys belonging to him to be transferred to a bank account in the name of F. J. Ward, although the Court finds such transfer not to have been for the purpose of hindering, delaying and defrauding creditors, or putting his property beyond the reach of the creditors, and said Finding should show that bankrupt did cause to be opened and maintained a bank account in the name of F. J. Ward.

5. Objects to Finding No. 11, unless same be made to read that it is true that bankrupt caused to be trans-

ferred to one Spencer H. Logan two thousand (2,000) shares of Beach Petroleum Company stock and a promissory note in the sum of Three hundred twenty and 00/100 Dollars (\$320.00), although Referee finds such transfer to have been made without intent to hinder, delay and defraud creditors, etc.

6. Objects to Finding No. 13 unless same be made to read that it is true that bankrupt caused assets to be placed and concealed in the name of Jay Gould, Jr., within one (1) year prior to the filing of the petition in bankruptcy, although Referee finds same to have been done without intent to hinder, delay and defraud creditors.

7. Objects to that portion of Finding No. 14 in which the Court finds that the liabilities of the bankrupt have been satisfactorily explained as financial reverses incurred in the stock market crash of 1929, on the ground that same is irrelevant, incompetent and immaterial, and that the cause of the losses is no explanation of how the liabilities [90] were incurred and what disposition was made of bankrupt's assets or how the losses were sustained.

8. Objects to Finding No. 15 on the ground that it finds that Reconstruction Finance Corporation has other means of realization of its claim against bankrupt herein, etc., which is irrelevant, incompetent and immaterial, and is objected to on said ground. Objection is made to the Finding in said numbered Finding that the Estate of John T. Cunningham, deceased, one of the co-signers of the obligation upon which objector's claim is based, is financially responsible, and will be compelled to pay the claim of Reconstructions Finance Corporation in full, irrespective of the outcome of this proceeding, upon the

ground that same is irrelevant, incompetent and immaterial, and on the further ground that the facts are that the Cunningham Estate has not sufficient assets to pay objector's claim in full; that it is estimated that the assets of said estate, as nearly as can be ascertained at the present time, are approximately Three hundred thousand and 00/100 Dollars (\$300,000.00); that other claims have been filed and allowed against the estate; that objector's claim, with interest, at the present time amounts to approximately Three hundred sixty thousand and 00/100 Dollars (\$360,000.00); that even though it prevails against said estate and collects therefrom, it will have a deficiency on its claim of approximately Sixty thousand and 00/100 Dollars (\$60,000.00) or more; that the right of objector to a claim against said estate is being contested in the Circuit Court of Cook County, Illinois on appeal from the probate court thereof; that the estate and the beneficiaries thereof are taking the position that the judgment obtained on the note extinguished the liability on said note, and that said note was merged in the judgment, and that the judgment, being against more than one, is a joint judgment under the law; that the common law prevails and that under the common law, upon the death of a joint judgment debtor or any other joint obligor, the estate is not liable on the obligation, the liability then being that of the surviving joint obligor, and that if the estate pre- [91] vails in such contention, objector may not make any recovery in said estate. For the same reasons, objection is hereby made to that portion of said Finding which finds that objector is amply assured of receiving payment in full of its claims and will not be affected by the plan whether approved or not.

Objection is further made to that portion of said Finding No. 15 which finds that the parties to the transaction intended to be governed by the State of Illinois where the transaction took place, and that under the Statute of Limitations of Illinois, the right of action on the Vollentine promissory note has not been barred for the reason and upon the ground there is no evidence in the record as to any intention, the only evidence respecting said note being the Vollentine claim itself, and that portion of said Finding which finds that the Statute of Limitations of Illinois is applicable herein is contrary to the law and facts since the law of the Forum prevails, and under the law of the State of California, the said claim is barred even though it might not as yet be barred in a Forum in the State of Illinois, and for the further reason that such Finding or any Finding as to whether or not it is barred in the State of Illinois is under the circumstances irrelevant, incompetent and immaterial.

Objection is further made to each and all of the Findings hereinbefore objected to on the ground that same are not based upon and are contrary to the record and contrary to the law.

II.

Objection is hereby made to each and all of the Conclusions of Law, for the reason and upon the ground that they are not nor is any of them based upon the record, and each and all thereof is and are contrary to the record and contrary to the law.

III.

Objection is made to the proposed Order for the reason and upon the ground that same is and each and every

part thereof is contrary to the record, not based thereon, not justified thereby, and contrary to the law. [92]

IV.

Said Reconstruction Finance Corporation does hereby petition for a re-opening of this matter and further hearing and rehearing thereof, unless the portions objected to hereinabove be stricken. If they be or any portion thereof be retained in said Findings, then said petition is made for such rehearing and further hearing and reopening in order to permit petitioner to introduce into the record the true facts hereinabove set forth (same being underscored hereinabove), to make certain that said facts be in the record if not already contained therein and in the interests of equity and justice so that any decision made herein may be based upon true and correct facts and not upon error. In lieu of such rehearing or renewed or additional hearing, petitioner proposes that it be stipulated that the said facts be made a part of the record and treated as introduced in evidence herein.

JACOB J. LIEBERMAN and
FRANK A. PETTIBONE

By Jacob J. Lieberman

Attorneys for Claimant and Objector, Reconstruction
Finance Corporation

Dated at Los Angeles, California, this 18th day of
September, 1942.

[Endorsed]: Filed Sep. 19, 1942 at 55 min. past 11
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk. g.

[Endorsed]: Filed Dec. 30, 1942. [93]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND OR-
DER, UPON OBJECTIONS OF R. F. C. TO
BANKRUPT'S DISCHARGE AND TO CLAIM
OF EUGENIA VOLLENTINE

Comes now Reconstruction Finance Corporation, the
objecting creditor in the above entitled matter, by its at-
torneys, Jacob J. Lieberman and Frank Michels, and

Objects to the findings of fact, conclusions of law, and
order in the following respects and upon the following
grounds hereinafter set forth:

I.

Objects to that portion of finding number 5 reading:
"The total amount of the claims which will participate
in any plan of arrangement is \$729,037.39." Included in
said amount is the claim of Eugenia Vollentine in the sum
of \$168,410.85 which was at the time of the filing of the
petition in bankruptcy herein barred by the Statute of
Limitations of the State of California as is hereinafter
more particularly set forth; that said portion of said
findings should read: "The total amount of claims which
will participate in any plan of arrangement is \$560,626.54."

II.

Objects to finding number 6; that said finding should
be as follows: "The Court finds that said plan of ar-
rangement is not for the best interests of the creditors of
the bankrupt." It is stated in paragraph 3 of said find-
ings that the bankrupt has a contingent interest in a trust
estate created by his father which terminates upon the

death of his mother now 70 years of age, upon the happening of which event the bankrupt will receive one-third of the corpus of said estate. It appears from the evidence that said trust estate now exceeds the sum of one million dollars. The creditors would by said plan of arrangement be prevented from proceeding against said fund in the event that [94] said bankrupt survives his mother.

III.

Objects to finding 7. Said finding should read as follows:

“7. The Court finds that said plan is not fair and equitable and is not made in good faith; that the plan was not offered until after objections were filed to the discharge of said bankrupt and was filed more than one year after the adjudication of said bankrupt and was for the purpose of avoiding the effect of the acts committed by him which would operate as a bar to his discharge.”

IV.

Objects to finding 8. Said finding is against the uncontradicted evidence and admissions of the bankrupt made in said proceeding as is hereinafter more specifically set forth.

V.

Objects to findings 9 and 10 wherein it is stated that the failure of the bankrupt to keep books of account or records and the fact that the bankrupt acknowledged he had destroyed his cancelled checks is excusable under all the circumstances of the case. There should be substituted for said findings the following:

"The Court finds that the failure of the bankrupt to keep books of account and records from which his financial condition and business transactions might be ascertained and the fact that the bankrupt acknowledged he had destroyed his cancelled checks monthly was not justified in view of the fact that the bankrupt within a period of several years immediately preceding the filing of said petition in bankruptcy maintained a bank account in the name of F. J. Ward for the purpose of concealing the funds therein from his creditors and hindering and delaying his creditors."

VI.

Objects to finding 11. Said finding is against the uncontradicted evidence and admissions of the bankrupt made in said proceeding as is [95] hereinafter more specifically set forth.

VII.

Objects to findings 12 and 13. Said findings are in conflict with the following uncontradicted evidence and admissions made by the bankrupt. The bankrupt testified:

(Vol. I, p. 30) "I had a bank account in the Security-First National Bank of Los Angeles, Hollywood and Cahuenga Branch. The account was in the name of F. J. Ward and checks were signed by myself for Mr. Ward."

(Vol. I, p. 39). "This account was closed in August or September of 1940."

(Vol. I, p. 94): "The reason for that was that I was continually harassed by sheriff's orders or something like that, and I was just afraid to try and do anything."

(Vol. I, p. 98) "Yes, when did they start harassing you so you could not do business? A. I consider they have been doing it ever since 1930."

(Vol. I, p. 107-108) "Q. You had an account in the Name of F. J. Ward? A. That is right. Q. At the Security-First National Bank in Hollywood? A. Hollywood and Cahuenga. Q. What did you use that account for, the account in the name of F. J. Ward? A. I used it as a banking account. Q. To pay your personal expenses and things of that kind? A. Yes. Q. To pay your department store accounts? A. Yes. Q. When did you open the account in the name of F. J. Ward? A. The bank has the record— Q. I want your recollection. A. I think I opened it in the fall of 1938. The Referee: What was the purpose of carrying the account in the name of F. J. Ward? A. Because I was having a lot of trouble at the time with my former wife and I had had my bank account attached prior to that, so I carried it in his name."

(Vol. II, p. 17). "On or about December, 1939, I had an average balance in my bank account in the name of F. J. Ward, in excess of [96] \$1,000.00." The account of the bankrupt in the name of F. J. Ward, commencing December 13, 1938, up to the date of the closing of the account on August 30, 1940, consisting of four ledger sheets and two signature cards was offered in evidence as trustee's Exhibit No. 2.

(Vol. II, p. 23) "On or about September 6, 1939, I was served with a summons and complaint in an action filed in the Superior Court of Los Angeles

County, No. 444,462, entitled Martin T. O'Brien as receiver of the Reliance Bank and Trust Company, plaintiff, versus Harold C. Strotz, defendant."

On August 21, 1940, Judge Wilson of the Superior Court in the O'Brien suit issued an order upon the bankrupt to show cause why he should not be restrained from transferring, hypothecating, or creating any lien upon any and all moneys, credits, or other things of value owned by or in possession or under the control of the Security-First National Bank of said Harold C. Strotz (Vol. II, p. 39-40), was returnable August 30, 1940, and was served on the bankrupt August 28, 1940. At the time of the service of the rule on the bankrupt on August 28, 1940, there was a balance in the "Ward" bank account of \$676.57. On September 6, 1940, bankrupt filed his affidavit in opposition to the order to show cause, in which he stated that he did not have a bank account at the Security-First National Bank of Los Angeles at the time of the service of the order (Vol. II, p. 39-40).

F. J. Ward testified (Vol. I, p. 181) that Strotz told him "there was a possibility of certain moneys of his being attached and he asked me if I would object to having that account and I said no."

During the course of the hearing the Referee made the following statements:

(Vol. II, p. 156) "The Referee: I will tell you frankly the testimony thus far that impresses me in this matter, and the only testimony that impresses me is the fact these men were very close friends, lived together in the one house, that [97] Mr. Ward did

permit Mr. Strotz to use his name to carry a bank account in, and that it was being done for the purpose of keeping funds away from Mr. Strotz's creditors, backed by the further fact that Mr. Ward knew Mr. Strotz was in financial difficulty and the fact they carried on these transactions, together with the close relationship shown by the transactions in the oil venture—referring to the two covered by Respondent's Exhibits A and B, and shown by some of the contracts relating to the same transaction."

(Vol. II, p. 164) "The Referee: The testimony shows here that Mr. Strotz wanted to do something to prevent creditors from reaching his money, and Mr. Ward in 1938 was perfectly willing to go along with him and cooperate with him in that manner, and the Court can take that into consideration in determining whether or not he was willing to assist Mr. Strotz in protecting himself in some other matters. While you can argue the matter, I am afraid you cannot make any impression on the Court on that point."

(Vol. II, p. 165) "The Referee: That may be the testimony but the view of the Court from the testimony I have heard is I am impressed with this, that Mr. Strotz was not worried about his wife attaching him one-half as much as he was about someone else attaching. Mr. Garbus: There wasn't another single solitary creditor mentioned at the time, or evidence that another creditor existed at that time. The Referee: The Court cannot accept that viewpoint."

(Vol. II, p. 169-172) "The Referee: Well, Mr. Strotz testified here, and he has been very frank about it, in substance that he put this money where it could not be attached. Mr. Garbus: Which money is that? The Referee: Put it in Mr. Ward's bank account. Mr. Garbus: There wasn't any money then—just a few hundred dollars. The Referee: Any other construction of his testimony in that regard would certainly be a very, very strange construction." [98]

"Mr. Garbus: Yes, but this reflects upon the bankrupt, and you know very well if it is to be brought in on the charge of fraud on the part of the bankrupt I will resist it to the last, and every attorney should. Your Honor, Mr. Strotz testified he opened this bank account solely for the purpose of giving him the opportunity not to be harassed by attachments. That is true. He made the general statement but he had in his mind his ex-wife, but that is not a wrong as far as his creditors— The Referee: Let us see whether or not it is. If he did put this money in the bank so he could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carries the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it. Mr. Garbus: Your Honor, would your Honor say then that the law is a man who is in debt must wear his heart on his sleeve, as far as his creditors are concerned? That is not the law. The law is a man in debt has a right to prefer one creditor over another, he has the right to invest

his money in a speculation, he has a right to buy things he needs, an automobile and clothing— The Referee: If there has been any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got money, so there is no preferring one creditor over another. They have been all very much in the same class, they have not gotten anything, as far as the testimony is concerned.”

There should be substituted for said findings the following:

“That the bankrupt from October 22, 1939, until August 30, 1940, being within a period of twelve months immediately preceding the filing of the petition in bankruptcy, maintained a bank account in the name of F. J. Ward for the purpose of concealing from his creditors money deposited and maintained therein with intent of hindering, delaying, and defrauding his creditors, and [99] putting his property beyond the reach of his creditors, in which said bank account during said period the bankrupt made 34 deposits aggregating \$16,910.77 and issued 183 checks aggregating \$17,341.30.”

VIII.

Objects to findings 20 and 21. Said findings are contradicted by the following uncontradicted evidence and admissions made by the bankrupt. Anne Gould Strotz, the wife of the bankrupt, died September 13, 1938 (Vol. I, p. 36). The bankrupt was appointed executor for her estate by the Superior Court of Los Angeles, California, October 25, 1938, and no inventory was filed until March 12, 1940 (Vol. I, p. 309). From the time of his appoint-

ment as executor until March 1940, the bankrupt received, as executor of the estate, approximately \$18,000 (Vol. I, p. 36). The bankrupt testified as follows:

(Vol. I, p. 140) "I received the first of this money in 1939, and the last of it in February, 1940. With this money, I went to Honolulu and to New York and to Chicago, and I tried to make arrangements to settle my other accounts."

(Vol. I, p. 141) "Most of this money I kept in cash. I may have deposited one or two thousand dollars in the account I had in the name of F. J. Ward. When I say I kept it in cash I mean cashier's checks drawn on the Security-First National Bank. I received the money at different times. I used some of it for living expenses and some for trips."

(Vol. I, p. 304-305). "Mr. Dechter: Q. Mr. Strotz, I will show you a letter written by your counsel, Simon and Garbus, to William J. Curren dated October 23, 1939 in re Martin T. O'Brien, and so forth, versus Harold C. Strotz.

"Dear Mr. Curren: This is to confirm our understanding that the defendant in the above-entitled action need not answer the complaint on file herein or otherwise plead in said action until you give to this office notice requesting him so to do. We understand that in the meantime you will advise this office [100] as to the attitude of your client in extending the prosecution of this action to preparations for settlement of this matter. Yours very truly, Simon and Garbus by Morton Garbus."

Does that refresh your memory you withdrew this \$11,500 after this action was pending against you? Mr. Garbus: What is the date of that letter? A. October 23, 1939. Mr. Garbus: That is nearly six months, isn't it? Mr. Dechter: Will you read the question? (The reporter read the pending question.) A. Well, of course I withdrew it afterwards, if that is the date of the letter."

(Vol. I, p. 308-309). "Mr. Dechter: Q. Mr. Strotz, I will show you the ledger sheet of the Security-First National Bank, Hollywood and Cahuenga Branch, which shows that you made the following deposits to the account of the estate of *Ann G. Strotz*: October 29, 1938, \$1,562; November 28, 1938, \$447.77; April 21, 1939, \$3,000.00; June 13, 1939, \$15,000.00.

The witness calls my attention to the fact I missed a dollar deposit on May 5, 1939. June 29, 1939, \$5,000.00; November 9, 1939, \$5.87; December 14, 1939, \$300.00; February 26, 1940, \$16,948.12; or a total of approximately a sum in excess of \$40,000.00 between those dates."

(Vol. II, p. 45-46) "I issued a check on the Hollywood and Cahuenga Branch of the Security-First National Bank of Los Angeles to the estate of Anne Gould Strotz by Harold C. Strotz, executor, for \$11,500.00, payable to the order of myself. I took this check and received in return for the same cashier's checks aggregating the sum of \$11,500.00."

(Vol. II, p. 49) "I took this money out to pay certain bills, and I drew it out because I will admit

I was afraid my bank account might be attached in some form or other."

(Vol. II, p. 50) "At the time I drew this money from the estate account. I kept it in cashier's checks. I had this checking account in the name of F. J. Ward." [101]

(Vol. II, p. 51) "I have been insolvent since December, 1929."

(Vol. II, p. 95) Witness shown check dated October 20, 1939, drawn on the estate of Anne G. Strotz account for \$1,000.00 and testified (p. 96) that it was drawn without a court order. The check was made payable to Harold Strotz.

(Vol. II, p. 97) "I don't know what I did with that particular money."

(Vol. II, p. 98) Bankrupt shown check of estate dated July 1, 1939, payable to bankrupt in the sum of \$4,000.00."

(Vol. II, p. 99) "I did not have a court order from the probate court of Los Angeles County authorizing that withdrawal. I believe I took \$2,000.00 of this money with me to Honolulu. I have no record of what I did with it. This withdrawal of \$4,000.00 on July 1, 1939, was made after I deposited \$5,000.00 in the account of the estate of Anne Gould."

(Vol. II, p. 102) "I was the residuary beneficiary of the estate and withdrew funds from the estate ac-

count from time to time and used those funds for my personal benefit.”

(Vol. II, p. 103) “The estate of Anne Gould was opened in October, 1938, and no inventory was filed until March 12, 1940.”

(Vol. II, p. 113-114-115-116) Bankrupt shown check (trustee's Exhibit No. 6) for \$11,500.00 drawn on the estate account of Anne G. Strotz payable to bankrupt and bankrupt testified that in exchange for this check he received the following cashier's checks, dated February 26, 1940: Check No. 777,205 for \$3,600.00 payable to Harold C. Strotz. Check No. 777,207 for \$1,500.00 payable to Harold C. Strotz. Check No. 777,204, payable to Sidney M. Strotz, brother of bankrupt for \$3,000.00. Check No. 777,201 payable to Bekins Van & Storage Company for \$600.00. Check No. 777,202 payable to Guy M. Peters for \$500.00. Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00. These checks total \$9,700.00. “I don't remember whether I received the balance of the \$11,500.00 [102] in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940.”

(Vol. II, p. 116) “With reference to the check made out to my brother, Sidney M. Strotz for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check

of my brother for \$3,000.00 drawn on the First National Bank of Chicago.”

(Vol. II, p. 177) “When the personal check for \$3,000.00 was received back from my brother, I deposited it in the bank account I had in the name of F. J. Ward. When I received this personal check of my brother’s for \$3,000.00 he said he would not accept it as I needed it more than he did. I sailed for Honolulu July 27, 1939, and returned September 13, 1939.”

Said findings should read as follows:

“20. That said bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00, which he withdrew from the bank account of the estate of Anne Gould Strotz, his deceased wife, for the purpose of putting the same beyond the reach of creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

“21. That said bankrupt, within one year preceding the filing of the bankruptcy petition herein, failed to file any inventory and appraisement in the estate of Anne Gould Strotz, deceased, pending in the Superior Court of Los Angeles County, for the purpose of concealing from his creditors the fact that there were assets in said estate, and the fact

that his interest in said estate was of some value, all with intent to hinder, delay and defraud his creditors; and failed to file an inventory in said estate until after he had appropriated and disposed of, to his own use and benefit, moneys and property to which he was entitled as the heir of said estate." [103]

IX.

Objects to that portion of finding 23 which reads as follows:

"and the Court further finds that since August 12, 1930 to the date of the filing of the petition in bankruptcy herein, October 22, 1940, the bankrupt had and received no assets or money of any consequence excepting the sum of Eleven thousand five hundred and 00/100 Dollars (\$11,500.00) as heir of the estate of his deceased wife, Anne Gould Strotz, which sum was expended by him for his living expenses and to meet certain of his obligations, as aforesaid."

Said finding is contradicted by the admissions of the bankrupt and uncontradicted evidence hereinbefore set forth.

X.

Objects to finding 25 for the reason that by the admissions of the bankrupt and uncontradicted evidence the objections of the Reconstruction Finance Corporation are amply sustained.

XI.

Objects to finding 26. There should be included in said finding the following:

“Said claim of Eugenia Vollentine is based upon five notes dated January 14, 1932, due two, three, and four years after date. In the State of California the Statute of Limitations upon a note is four years. The bankrupt for a period of more than four years immediately preceding the filing of his petition in bankruptcy was a resident of the State of California. It is the settled law of the State of California that an action brought on a note in the State of California against a resident of the State of California, executed in a foreign state, is controlled by the California four-year Statute of Limitations. *Sullivan vs. Shannon*, 25 Cal. App. 2d 422, 77 Pac. 2d 422, and cases therein cited.” [104]

Objects to conclusions of law 1 and 2 for the reason that they are predicated on an erroneous statement of facts.

JACOB J. LIEBERMAN

Jacob J. Lieberman

FRANK MICHELS

Frank Michels

Attorneys for Reconstruction Finance Corporation.

[Endorsed]: Filed Oct. 20, 1942 at min past 9
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk. M.

[Endorsed]: Filed Dec. 30, 1942. [105]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed that the examinations under Section 21a and the hearing on the Trustee's petition against F. J. Ward were submitted to the Referee at the time of the submission of the Objections to the Discharge and Objections to Confirmation and Approval of Plan of Arrangement, and it was stipulated, and approved by the Court, that no further hearing should be had and no additional evidence or testimony need be introduced in connection with said submission, and that the Referee could decide the matter submitted based upon the relevant and material evidence examinations and testimony heretofore introduced in connection with the said proceedings under Section 21a and the hearing on the Trustee's Petition against F. J. Ward.

Dated: October 29, 1942.

SIMON & GARBUS

By Morton Garbus

Morton Garbus

Attorney for Bankrupt

JACOB J. LIEBERMAN and

FRANK MICHELS.

Attorneys for Reconstruction Finance
Corporation. Objector.

By JACOB J. LIEBERMAN

Jacob J. Lieberman.

[Endorsed]: Filed Nov. 13, 1942 at min. past 9
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk.

[Endorsed]: Filed Dec. 30, 1942. [106]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed that the examinations under Section 21a and the hearing on the Trustee's petition against F. J. Ward were submitted to the Referee at the time of the submission of the Objections to the Discharge and Objections to Confirmation and Approval of Plan of Arrangement, and it was agreed that all of said evidence and examinations and testimony were to be considered in connection with and as evidence upon said Objections to Discharge and Objections to Confirmation and Approval of Plan of Arrangement.

RAPHAEL DECHTER

Attorney for Trustee in Bankruptcy

R. DECHTER

Raphael Dechter.

JACOB J. LIEBERMAN and
FRANK MICHELS,

Attorneys for Reconstruction Finance Corporation,
Objector.

By Jacob J. Lieberman

Jacob J. Lieberman.

[Endorsed]: Filed Nov. 13, 1942 at min. past 9
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk. M.

[Endorsed]: Filed Dec. 30, 1942. [107]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSION OF LAW,
AND ORDER

The hearing on the bankrupt's amended plan of arrangement came on before the Honorable Ernest R. Utey, Referee in Bankruptcy, on the 22nd day of July, 1941, and was partially heard or continued to August 7, 1941, August 26, 1941, September 29, 1941, November 26, 1941, January 13, 1942, February 17, 1942, March 18, 1942, May 27, 1942, June 8, 1942, and July 20, 1942, the Trustee, E. A. Lynch, appearing by his attorney, Raphael Dechter; the bankrupt appearing by his attorneys, Simon & Garbus, by Morton Garbus; Reconstruction Finance Corporation, a creditor, appearing by its attorneys Frank A. Pettibone and J. J. Lieberman; F. J. Ward appearing his his attorney, Earl E. Moss; Continental Illinois National Bank and Trust Company of Chicago appearing by its attorney, Paul E. Iverson; and certain other creditors appearing by Messrs. Harold L. Watt, Harold E. Clary and Wm. J. Currer, Jr., and Grainger & Hunt, by Kyle Z. Grainger, attorneys for such creditors; and evidence being heard on the objections of the Reconstruction Finance Corporation that the plan of arrangement should not be approved because (1) the bankrupt had committed an act which would bar his discharge in bankruptcy, and (2) the claim of one creditor voting for the plan of arrangement is barred by the Statute of Limitations and without such claim there would not be a majority in favor of the plan; and evidence, both oral and written, having been introduced; and arguments having been heard, the Court renders this its Findings of Fact, Conclusions of Law, and Order based thereon, as follows:

Findings of Fact

1. That on October 22, 1940, the bankrupt herein filed a voluntary petition in bankruptcy, together with schedules attached, and on October 23, 1940, the said **bankrupt** was adjudicated a bankrupt. [108]

2. Schedules of the bankrupt reflect a total indebtedness of the bankrupt in the amount of \$1,881,830.86. That practically all of said indebtedness resulted from financial reverses suffered by the bankrupt as a result of the stock market crash in 1929, and a large portion of such indebtedness is the result of statutory liability of the bankrupt as an officer and director of certain national banks in Chicago, Illinois; that the claim of Reconstruction Finance Corporation is based upon a note, dated August 12, 1930, signed by the bankrupt and others for the sum of Two hundred ten thousand and 00/100 Dollars (\$210,000.00), upon which note the Madison Square Bank of which the signers of the note and the bankrupt were then directors received from the National Bank of the Republic of Chicago, Illinois, the payee of the note, a check for Two hundred ten thousand and 00/100 dollars (\$210,000.00).

3. The bankrupt is the son of one Charles Nicholas Strotz, deceased, who left an estate of considerable size to his wife, Clara A. Strotz, which was probated in Cook County, Illinois. The will of this deceased created a trust estate in which the bankrupt has a contingent interest, which is payable to the bankrupt in the event only that he should survive his mother, who is living. The said interest of the bankrupt is limited also by a spendthrift clause contained in the Last Will and Testament of the bankrupt's father, which provides that the interest of the

bankrupt in his father's estate is not subject to the claims of creditors, nor shall the bankrupt have the right to anticipate, assign or encumber his interest in the income or principal of said estate; that the bankrupt's mother, who is now living, is seventy (70) years of age and she is to receive the income for life from said trust and upon her death the corpus thereof is to be distributed in equal shares to three (3) children of said testator of whom the bankrupt is one.

3a. That it appears that the entire corpus of said trust is of the present value of approximately Nine Hundred Thousand (\$900,000.00) Dollars. That therefore, the bankrupt, in the event he pre-deceased his mother, would be entitled to one-third ($1/3$) of such trust. That here- [109] tofore and on or about the 15th day of February, 1930, and more than ten (10) years prior to the filing of these bankruptcy proceedings, the bankrupt caused an assignment to be made to the Chicago Title & Trust Company of Chicago, Illinois, as trustee for Pauline D. Rudolph, of his interest in said trust, as security for an indebtedness owing to such creditor in the sum of Eight Hundred Two Thousand Four Hundred Eleven and $77/100$ ths (\$802,411.77) Dollars. That said creditor, holding such assignment, has not filed a claim for his indebtedness in the above proceeding. That thereafter the bankrupt made a subsequent and junior assignment of his interest in said trust to the Continental Illinois National Bank and Trust Company of Chicago, Illinois, as security for their claim in the sum of Thirty Two Thousand Fifty Five Hundred and $10/100$ ths (\$32,055.10) Dollars. That said bank has filed a claim herein.

4. A first meeting of creditors of the bankrupt was held on November 19, 1940, as well as subsequent meetings, at which the bankrupt was examined at great length. The bankrupt has been examined on numerous occasions by the Trustee and his attorneys and by creditors, in an endeavor to uncover assets in this estate.

5. The total number of claims filed herein within the time allowed for the filing of claims amounts to \$974,-848.64. The claim of the estate of John T. Cunningham in the amount of \$245,811.25 has been previously disallowed, and the total amount of the claims which will participate in any plan of arrangement is \$729,037.39.

6. The Court finds that it is not true that said plan of arrangement is not for the best interests of the creditors of the bankrupt.

7. The Court finds that it is not true that said plan of arrangement is not fair, nor is it true that it is not equitable, nor is it true that it is not feasible.

8. The Court finds that it is not true that the debtor, Harold C. Strotz, the bankrupt herein, has been guilty of any act which would be a bar to the discharge of the bankrupt.

9. The Court finds that it is true that the bankrupt failed to [110] keep books of account and records from which his financial condition and business transactions might be ascertained, but that it is not true that the bankrupt mutilated, falsified or concealed any of his books of account or records, and in this connection this Court finds that the said failure of the bankrupt to keep books of account or records is excusable under all of the circumstances in this case and particularly in view of the fact

that the bankrupt for many years prior to the filing of his petition in bankruptcy was not engaged in any particular line of business and that the transactions carried on by him were not such as would require the keeping of a set of books or records.

10. That it is true that the bankrupt acknowledged that he had destroyed certain of his cancelled checks, but it is not true true that the bankrupt had no records of any kind which would indicate the amounts of money and property owned and received by him and the manner in which the same have been disposed of, and in this connection this Court finds that the destruction of certain of the cancelled checks of the bankrupt was excusable under all of the circumstances in this case, and particularly in view of the fact that the cancelled checks so destroyed were destroyed in the usual course of events and without any intent to hinder, delay or defraud creditors.

11. The Court finds that it is not true that the bankrupt did, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, transfer, or remove, or destroy, or conceal, or permit to be removed, or destroyed, or concealed, his property with the intent to hinder, or to delay, or to defraud his creditors.

12. The Court finds that it is true that the bankrupt opened a bank account on or about December 13, 1938 in the name of F. J. Ward, which said bank account was maintained as a current and running account by the bankrupt until August 30, 1940, but it is not true that the bankrupt had moneys on deposit in said bank account averaging in excess of Two Thousand and 00/100 Dollars (\$2000.00) from the 22nd day of October, [111]

1939, being a time one year prior to the commencement of these proceedings, to the date of the closing of said bank account, but in this connection the Court finds that the average amount on deposit in said bank account during the last mentioned period of time was approximately Four Hundred and 00/100 Dollars (\$400.00); and the Court finds that it is not true that the bankrupt did, for the purpose of hindering, or delaying, or defrauding his creditors, or putting his property beyond the reach of creditors, cause said bank account to be opened or maintained in the name of F. J. Ward.

13. The Court finds that it is not true that the bankrupt caused to be transferred moneys belonging to him to a bank account in the name of F. J. Ward with intent to hinder, or delay or defraud his creditors within twelve months preceding the filing of the petition in bankruptcy herein.

14. The Court finds that it is true that the bankrupt caused to be transferred to F. J. Ward one-half ($1/2$) of a seven and one-third ($7\frac{1}{3}\%$) per cent, or some percentage, overriding royalty interest in the lease known as the "Long Beach Harbor Lease of the Interstate Investment Corporation," which lease was acquired by the Interstate Investment Corporation under an agreement with the General Petroleum Corporation of California and is part of a lease dated December 29, 1936, held by the General Petroleum Corporation of California in certain property located in the Rancho Los Cerritos in the Wilmington Oil Field, Long Beach, California, which transfer was made within one (1) year preceding the filing of the bankrupt's petition herein, but the Court finds that said transfer to F. J. Ward was for good and

valuable consideration and pursuant to agreement between the bankrupt and the said F. J. Ward that the bankrupt would have no interest in the said seven and one-third ($7\frac{1}{3}\%$) per cent override royalty unless he assisted in raising the necessary financing for the development of said oil lease, and in this connection the Court finds that the bankrupt failed to raise his share of said necessary financing. [112]

15. The Court finds that it is not true that the bankrupt caused one-half ($\frac{1}{2}$) of a seven and one-third ($7\frac{1}{3}\%$) per cent or other percentage of an overriding royalty to be concealed in the name of F. J. Ward with intent to hinder, or delay or defraud his creditors.

16. The Court finds that it is not true that the bankrupt caused to be transferred to F. J. Ward a royalty interest in "Abel Well No. 2" with intent to hinder, or delay or defraud his creditors, but in this connection the Court finds that said transfer was for good and valuable consideration.

17. The Court finds that it is not true that the bankrupt caused to be concealed in the name of F. J. Ward, or otherwise, an overriding royalty referred to above with intent to hinder, or delay, or defraud his creditors, and the Court finds that there was no concealment in this regard.

18. The Court finds that it is true that the bankrupt caused to be transferred to one Spencer H. Logan, two thousand (2000) shares of stock of the Beach Petroleum Company and a Promissory Note in the sum of Three Hundred Twenty and 00/100 Dollars (\$320.00), but that

it is not true that said transfer or any part thereof was so made by the bankrupt with intent to hinder, or delay, or defraud his creditors, but that said transfer was made for good and valuable consideration.

19. The Court finds that it is not true that the bankrupt caused to be concealed in the name of Spencer H. Logan or otherwise, two thousand (2000) shares of stock of the Beach Petroleum Company, or caused to be concealed a Promissory Note of the Beach Petroleum Company for the sum of Three Hundred Twenty and 00/100 (\$320.00) Dollars, or any stock or note with intent to hinder, or delay, or defraud the creditors of the bankrupt, and the Court finds that there was no concealment in this regard.

20. The Court finds that the bankrupt did withdraw the sum of Eleven Thousand Five Hundred and 00/100 Dollars (\$11,500.00) from the estate of Anne Gould Strotz, deceased, as executor of said estate, and [113] that he paid said sum to himself as the beneficiary of said estate, which sum he expended for his living expenses and for the payment of certain of his obligations, but the Court finds that it is not true that he withdrew said money for the purpose of hindering, or delaying, or defrauding his creditors, or that he caused said money to be concealed for the purpose of putting the same beyond the reach of creditors, and in this connection the Court finds that at the time of the withdrawal of said sum of money there was no creditor of the bankrupt then in a position to reach said money by a levy of attachment or execution upon any judgment.

21. The Court finds that it is not true that the bankrupt, within one (1) year preceding the filing of the bank-

ruptcy petition herein, failed to file any inventory and appraisal in the estate of Anne Gould Strotz, deceased, pending in the Superior Court of Los Angeles County for the purpose of concealing from his creditors the fact that there were assets in said estate, or the fact that his interest in said estate was of some value, with intent to hinder, or delay, or defraud his creditors, and that it is not true that the bankrupt failed to file an inventory in said estate until after he had appropriated and disposed of to his own use and benefit moneys and property to which he was entitled as the heir of said estate; in this connection the Court finds that the said inventory and appraisal was filed by the bankrupt in the said probate estate on the 12th day of March, 1940, showing a gross estate belonging to the decedent, Anne Gould Strotz, in the sum of Forty Eight Thousand Seven Hundred Thirteen and 20/100ths Dollars (\$48,713.20); and in this connection the court finds that said probate estate and all of the proceedings held therein were at all times open to the general public and to the creditors of this bankrupt who, upon inquiry, could have determined the amount and nature and assets of said estate and the interest therein of the bankrupt; and in this connection the Court further finds that the assets of said estate were marshalled by the bankrupt, as executor thereof, from time to time and until the [114] 12th of March, 1940, during which time the bankrupt, as said executor, received various sums of money from various sources, but that the bulk of said estate consisting of cash received by way of settlement of threatened litigation was so received within a short and reasonable time prior to the filing of the said inventory and appraisal.

22. The Court finds that it is not true that the bankrupt, with intent to hinder, or delay, or defraud his creditors, caused to be concealed certain or any assets in the name of Jay Gould, and in this connection the Court finds that the bankrupt did not transfer to Jay Gould any assets within one (1) year of the filing of the petition of bankruptcy or otherwise.

23. The Court finds that it is not true that the bankrupt failed to explain satisfactorily his loss of assets and the deficiency of assets to meet his liabilities, and that it is not true that the bankrupt failed to give full particulars in that regard, but in this connection the Court finds that the liabilities of the bankrupt have been satisfactorily explained as financial reverses incurred in the stock market crash of 1929, and in this connection the Court further finds that all of the liabilities of the bankrupt totalling \$1,881,830.86 were incurred by the bankrupt at a time prior to the stock market crash of 1929 save and except the obligation of the bankrupt to the Reconstruction Finance Corporation which obligation was incurred on August 12, 1930; and the Court further finds that since August 12, 1930 to the date of the filing of the petition in bankruptcy herein, October 22, 1940, the bankrupt had and received no assets or money of any consequence excepting the sum of Eleven Thousand Five Hundred and 00/100 Dollars (\$11,500.00) as heir of the estate of his deceased wife, Anne Gould Strotz, which sum was expended by him for his living expenses and to meet certain of his obligations, as aforesaid.

24. The Court finds that every creditor who has a provable and allowable claim herein, has recommended the approval of the plan of arrangement submitted by the

bankrupt pursuant to which the creditors of [115] the bankrupt would receive the sum of Thirty Two Thousand and 00/100 Dollars (\$32,000.00), which the bankrupt has borrowed from his stepson, Jay Gould, and which is available conditional upon the approval of said plan of arrangement, save and except that the creditor, the Reconstruction Finance Corporation is the only creditor objecting to the approval of said plan. In this connection the Court finds that the Reconstruction Finance Corporation may possibly recover a substantial portion, if not all, of its claim herein, as against and from one of the co-signers of the Promissory Note upon which the obligation of the bankrupt to the said objecting creditor is based; to wit, against the estate of John T. Cunningham, deceased; that it is estimated that the assets of said estate of John T. Cunningham, deceased, as nearly as can be ascertained at the time are approximately Three Hundred Thousand and 00/100 Dollars (\$300,000.00), and that said assets may amount to more or less from time to time; that other claims have been filed and allowed against the estate; that objecting creditor's claim, with interest, at the present time amounts to approximately Three Hundred Sixty Five Thousand and 00/100 Dollars (\$365,000.00); that even though it prevails against said estate and collects therefrom, it will have a deficiency on its claim of approximately Sixty Five Thousand and 00/100 Dollars (\$65,000.00) or more; that the right of objector to the claim against said estate is being contested in the Circuit Court of Cook County, Illinois, on appeal from the probate court thereof; that the estate and the beneficiaries thereof are taking the position "that the judgment obtained on the note extinguished the liability on said note,

and that said note was merged in the judgment, and that the judgment, being against more than one, is a joint judgment under the law; that the common law prevails and that under the common law, upon the death of a joint judgment debtor or any other joint obligor, the estate is not liable on the obligation, the liability then being that of the surviving joint obligor, and that if the estate prevails in such contention, objector may not make any recovery in said estate." [116]

25. The Court finds that there has been no sufficient evidence introduced in this proceeding to warrant the denial of the discharge of the bankrupt.

26. The creditor, Reconstruction Finance Corporation objects to the approval of the plan of arrangement on the ground that a majority of the creditors have not approved the same and as the basis of said contention maintains that the claim of one of the creditors herein voting in favor of the plan; to wit, Eugenia Vollentine, is barred by the Statute of Limitations, and if disallowed on that ground that there would then not be a majority of creditors in number and amount in favor of the plan. In this connection the Court finds that the claim of the said creditor, Eugenia Vollentine is based upon a Promissory Note which was executed and delivered to her by the bankrupt in Chicago, Illinois, and that in the State of Illinois the Statute of Limitations upon a Promissory Note is ten (10) years, and that the said Promissory Note is not now barred by the Statute of Limitations of the State of Illinois, and that an action on said Promissory Note could now be maintained against the bankrupt in the State of Illinois were it not for this proceeding in bankruptcy.

26a. The Court finds that under said trust of the father of the bankrupt, the bankrupt was designated as an investment counselor or adviser to the trustee under said trust. That by reason of such position under said trust, the bankrupt has been required from time to time in the past to make trips to Chicago to consult with the trustee under said trust, and the bankrupt will be required in the future to continue to make such trips from time to time to Chicago as part of his duties under said trust.

27. The Court finds that the claim of the Continental Illinois National Bank and Trust Company of Chicago is that of an unsecured general creditor.

Based upon the foregoing Findings of Fact, the Court makes its Conclusions of Law: [117]

1. The Court concludes that the evidence introduced in support of the objections to the discharge of the bankrupt is insufficient to warrant denial of the bankrupt's discharge, and such objections are therefore not grounds for the refusal by this Court of approval of a plan which appears to be for the best interests of the creditors herein.

2. The Court concludes that a majority of the creditors in number and amount have duly approved the proposed plan, and the plan appearing to be fair and equitable and for the best interests of the creditors, the same should be approved by the Court.

Based upon said Findings of Fact and Conclusions of Law,

It is ordered that the amended plan of the bankrupt herein be and the same is hereby approved; that the sum

of Thirty Two Thousand and 00/100 Dollars (\$32,000.00) offered in the plan be declared assets of the above estate, subject to distribution to creditors whose claims have been filed and allowed herein, after deducting therefrom such sums as the Court may fix and allow and order paid as fees, costs and expenses of administration; that Harold C. Strotz, as debtor, be released and discharged from the claims of indebtedness scheduled by him herein; that the funds heretofore received by the Trustee in connection with the litigation against F. J. Ward be surrendered to F. J. Ward; that any and all other moneys or assets remaining at this time in the possession of the Trustee other than said sum of Thirty Two Thousand and 00/100 (\$32,000.00) Dollars, be released to the bankrupt and debtor herein; that the Trustee be and he hereby is directed to dismiss the action heretofore commenced against Spencer H. Logan, as well as any other proceedings that may be pending, heretofore instituted by the Trustee.

Dated this 2nd day of December, 1942.

ERNEST R. UTLEY

Referee in Bankruptcy.

[Endorsed]: Filed Dec. 2, 1942 at min. past 10
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk.

[Endorsed]: Filed Dec. 30, 1942. [118]

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME TO FILE
PETITION FOR REVIEW

Petition having been made by Reconstruction Finance Corporation for an extension of time to file petition for review of the Order overruling the objections of Reconstruction Finance Corporation to the Findings of Fact and Conclusions of Law and Order confirming plan of arrangement and making and entry of Findings of Fact and Conclusions of Law and Order confirming plan of arrangement and overruling the objections of Reconstruction Finance Corporation to the claim of Eugenia Vollen-tine and to the plan of arrangement offered by said bankrupt, which Order or Orders was or were made on December 2, 1942, and good cause being shown therefor;

It is hereby ordered that said petition be and is hereby granted and the time of Reconstruction Finance Corporation to file its petition to review the said Order or Orders be and is hereby extended to and including December 31, 1942.

Dated and signed at Los Angeles, California, this 8th day of December, 1942.

ERNEST R. UTLEY

Ernest R. Utley

Referee in Bankruptcy

[Endorsed]: Filed Dec. 8, 1942 at 30 min. past 3 o'clock p. m. Ernest R. Utley, Referee; Louise Rodgers, Clerk. C.

[Endorsed]: Filed Dec. 30, 1942. [119]

[Title of District Court and Cause.]

PETITION OF RECONSTRUCTION FINANCE
CORPORATION TO REVIEW ORDER EN-
TERED DECEMBER 2, 1942.

To the Honorable Ernest R. Utley, Referee in Bank-
ruptcy:

Now comes Reconstruction Finance Corporation, a cor-
poration created by act of Congress of the United States
of America, and respectfully alleges:

I.

That said Harold C. Strotz was duly adjudged a bank-
rupt October 23, 1940, on a petition filed by him in the
above cause on the 22nd day of October, 1940.

II.

That your petitioner is a creditor of Harold C. Strotz,
the bankrupt; that on March 13, 1941, it filed its claim
herein for the sum of \$245,811.25.

III.

That within the time prescribed by this Court for filing
objections to discharge in this cause, to wit, on March
19, 1941, petitioner filed its objections to the granting to
said bankrupt a discharge from his debts and specified as
grounds of objection the following:

[Here followed the quotation of "Specification of Ob-
jections to Discharge" which will be found at page 63
of the Transcript of Record so is not repeated at this
time.]

IV.

That after the filing of said objections to discharge, to
wit, on April 30, 1941, said Harold C. Strotz, bankrupt

herein, filed his petition under Chapter XI of the Bankruptcy Act, Section 321 thereof, in the [120] above mentioned bankruptcy proceeding to effect an arrangement with his creditors as follows:

“A. Secured Creditors:

“1. Your petitioner is indebted to the estate of Pauline D. Rudolph and to Franklin N. Dohn, Charles Dohn, Pauline Dohn, Rudolph Sherman, Herbert N. Butz, John A. Faher, Trustee for Franklin Dohn Rudolph, in the sum of \$827,411.77, which claim is secured by a collateral Trust agreement in the favor of Chicago Title and Trust Company of Chicago, Illinois, as trustee for Pauline D. Rudolph, by the terms of which petitioner proposed to transfer, as collateral security for said indebtedness, all of his right, title and interest as beneficiary under the Last Will and Testament of Charles Nicolas Strotz, deceased. This creditor has not filed a claim in this bankruptcy proceeding to the date hereof.

“2. Your petitioner is also indebted to Continental Illinois Bank and Trust Company of Chicago, Illinois, in the sum of \$32,055.70. In connection with this indebtedness, your petitioner executed what purports to be an authorization directed to the First National Bank of Chicago, as Trustee of the residuary trust estate created under the Last Will and Testament of petitioner's father, Charles Nicolas Strotz, deceased, authorizing said trustee to pay the claim of the said creditor out of any of the assets which your petitioner might be entitled to receive from said residuary trust estate at the time fixed for the distribution of the corpus thereof.

“The above two are the only secured creditors of petitioner. In view of the fact that there are no assets in this bankruptcy estate, available for secured creditors, save the interest which petitioner may have in his father’s trust estate as aforesaid, and in view of the fact that the secured creditor, estate of Pauline D. Rudolph, as aforesaid, has not filed any claim herein, this Arrangement will apply equally to secured and unsecured creditors filing claims.

“B. Unsecured Creditors: [121]

“All unsecured debts affected by this Arrangement shall be treated on a parity, save and except those creditors who may, in order to assist the petitioner in effecting this Arrangement, waive any claim to share therein.

“Your petitioner has no property or assets of any kind, but will arrange to obtain from his family, and will offer to his creditors, cash in the sum of \$10,000.00. In addition to said sum of \$10,000.00, your petitioner will execute any necessary writing, by the terms of which he will assign to his creditors who may have an interest in this bankruptcy proceeding and a right to share therein, ten per cent (10%) of the right, title or interest which petitioner may have as beneficiary under the Last Will and Testament of his father’s estate, Charles Nicolas Strotz, deceased. Attention is here called to the fact that pursuant to Paragraph XII of said Last Will and Testament of petitioner’s father, which is a ‘Spendthrift Clause’ provision, petitioner’s interest in his father’s estate is expressly declared to be not a vested interest and not subject to the right to an-

ticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.

"It is the intention of the petitioner, in making this offer to his creditors, that any and all proceedings which may now be pending by the Trustee in Bankruptcy herein, to set aside any conveyances heretofore made by petitioner, on the ground of fraud, be dismissed. This intention is here expressed, on the ground that petitioner has not entered into any fraudulent conveyances, and that in making this Arrangement, he desires to settle and compromise all claims of creditors who may have filed their claims herein, as well as any claims of any person or persons who may suffer loss by reason of any proceeding to set aside a conveyance of property made to him of them by your petitioner."

V.

On July 2, 1941, the above named bankrupt filed a proposed [122] amended plan of arrangement wherein it was stated as follows:

"That petitioner has arranged to obtain a loan in the sum of \$25,000.00 in cash, which sum he proposes to cause to be paid over to the above bankrupt estate, to be paid to those of his creditors whose claims on file herein will be allowed. That immediately upon the acceptance and approval of this petition said sum of \$25,000.00 in cash will be delivered over to the above bankrupt estate.

"That in addition to the payment of said sum of \$25,000.00, petitioner will execute and deliver to the Trustee in Bankruptcy herein all necessary documents,

by the terms of which he will assign to the creditors whose claims have been filed and allowed herein an interest to the extent of ten per cent (10%) of any right, title or interest which petitioner may have as beneficiary under the Last Will and Testament of his father's estate, Charles Nicholas Strotz, deceased. Attention is here called to the fact that pursuant to paragraph XII of said Last Will and Testament of petitioner's father, which is a 'spendthrift clause' provision, the interest of the petitioner in the estate of his father is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.

"It is the intention of the petitioner, in making this offer to his creditors, that any and all proceedings which may now be pending by the Trustee in Bankruptcy herein to set aside any conveyances heretofore made by petitioner, on the ground of fraud or otherwise, be dismissed. This intention is here expressed on the ground that petitioner has entered into no fraudulent conveyance, and that in making this Arrangement, he desires to settle and compromise all claims of creditors who may have filed their claims herein, as well as any claims of any person or persons who may suffer loss by reason of any proceeding to set aside any conveyance of property made to him or them by your petitioner. [123]

"It is also the intention of the petitioner that any assets of the bankrupt estate now in the possession of the Trustee in Bankruptcy as aforesaid be applied

upon and not be deemed to be in addition to the sum of \$25,000.00 offered herein."

VI.

Thereafter, on May 27, 1942, the bankrupt filed an amendment to said proposed plan of arrangement wherein he increased the offer of \$25,000.00 contained in said amendment of July 2, 1941. to \$32,000.00.

VII.

Eleven claims were filed in said bankruptcy proceeding within the time allowed for the filing of claims. The total amount thereof was \$974,848.64. One claim which was filed in the sum of \$245,811.25 was disallowed, leaving claims in the sum of \$729,037.39. Among the claims filed and allowed herein was a claim of W. E. Fleming, agent for Eugenia Vollentine, in the sum of \$168,410.85. Said claim was based upon five promissory notes executed by the bankrupt January 14, 1932, due two, three and four years after date. Reconstruction Finance Corporation objected to said claim upon the ground that same was barred by the Statute of Limitations of the State of California and objected to said claimant voting upon said petition for arrangement under Chapter XI, Section 321, or from participating in the distribution of the assets of said bankrupt estate.

VII.

It was stipulated that all of said matters be heard together and that the objections to the discharge of said bankrupt stand as objections to the said amended petition for arrangement filed under Chapter XI, Section 321.

IX.

The hearing of said matters came on before the Honorable Ernest R. Utley, Referee in Bankruptcy, and upon such hearing it was stipulated that the examination of said bankrupt under Section 21a of the Bankruptcy Act and the evidence taken upon a petition filed by the Trustee in Bank- [124] ruptcy against F. J. Ward be considered as evidence upon said matters.

X.

That after said hearing the said Honorable Ernest R. Utley, Referee in Bankruptcy, on the 2nd day of December, 1942, made findings of fact, conclusions of law, and an order in words and figures as follows:

[Here followed the quotation of the "Findings of Fact, Conclusions of Law and Order" which will be found at page 115 of the Transcript of Record so is not repeated at this time.]

XI.

That said order entered December 2, 1942, was and is erroneous in the following respects:

(a) That portion of finding number 5 reading:

"The total amount of the claims which will participate in any plan of arrangement is \$729,037.39."

is erroneous. Included in said amount is the claim of Eugenia Vollentine in the sum of \$168,410.85 which was at the time of the filing of the petition in bankruptcy herein barred by the Statute of Limitations of the State of California as is hereinafter more particularly set forth. The Referee should have found that:

"The total amount of claims which will participate in any plan of arrangement is \$560,626.54."

(b) The findings made in paragraph 3a of said order are erroneous and incomplete in the following respects. The evidence shows the corpus of the trust referred to to be approximately One Million Dollars and the annual income therefrom to be over Thirty Thousand Dollars (Vol. I, p. 17 transcript). The findings of the Referee with respect to the assignment by the bankrupt of his interest in said trust are misleading. It is stated in the plan of arrangement filed by said bankrupt:

“that pursuant to Paragraph XII of said Last Will and Testament [125] of petitioner’s father, which is a ‘Spendthrift Clause’ provision, petitioner’s interest in his father’s estate is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same, nor subject to claims of creditors of petitioner.”

Under the laws of Illinois, where said trust exists, said provision is valid and said assignments are void. Said trust under its terms terminates upon the death of the mother of the bankrupt and upon the happening of said contingency the said spendthrift clause will no longer be in effect; and if the bankrupt survives his mother, his distributive share will then be subject to the claims of his creditors.

(c) Finding number 6 is against the uncontradicted facts in the record. The Referee should have found:

“The Court finds that said plan of arrangement is not for the best interests of the creditors of the bankrupt.”

It is stated in paragraph 3 of said findings that the bankrupt has a contingent interest in a trust estate created

by his father which terminates upon the death of his mother now 70 years of age, upon the happening of which event the bankrupt will receive one-third of the corpus of said estate. It appears from the evidence that said trust estate now exceeds the sum of One Million Dollars. The creditors would by said plan of arrangement be prevented from proceeding against said fund in the event that said bankrupt survives his mother.

(d) Finding 7 is erroneous for the reason that the record discloses that said plan is not fair and equitable and was not made in good faith; that the plan was not offered until after objections were filed to the discharge of said bankrupt and the amended plan was filed more than one year after the adjudication of said bankrupt and was for the purpose of avoiding the effect of the acts committed by him which would operate as a bar to his discharge.

(e) Finding 8 is against the uncontradicted evidence and admissions of the bankrupt made in said proceeding as is hereinafter more [126] specifically set forth.

(f) Findings 9 and 10, wherein it is stated that the failure of the bankrupt to keep books of account or records and the fact that the bankrupt acknowledged he had destroyed his cancelled checks is excusable under all the circumstances of the case, are erroneous for the reason that it appears from the record that for a period of two years immediately preceding the filing of said petition in bankruptcy the bankrupt maintained a bank account in the name of F. J. Ward for the purpose of concealing the funds therein from his creditors and hindering and delaying his creditors. Said bank account consisted of a checking account at the Security-First National Bank at Los

Angeles, California, from December 13, 1938, to August 30, 1940. During said period he made 66 deposits aggregating \$26,260.16 and drew 308 checks aggregating \$26,260.16 (Exhibit 2). Each month he destroyed the cancelled checks and kept no books or records covering said transactions. Under such circumstances the Referee should have denied the discharge because of the failure of the bankrupt to keep books from which his financial condition may be ascertained.

(g) Finding 11 is against the uncontradicted evidence and admissions of the bankrupt made in said proceeding as is hereinafter more specifically set forth.

(h) Findings 12 and 13 are in conflict with the following uncontradicted evidence and admissions made by the bankrupt. The bankrupt testified:

(Vol. I, p. 30) "I had a bank account in the Security-First National Bank of Los Angeles, Hollywood and Cahuenga Branch. The account was in the name of F. J. Ward and checks were signed by myself for Mr. Ward."

(Vol. I, p. 39) "This account was closed in August or September of 1940."

(Vol. I, p. 94) "The reason for that was that I was continually harassed by sheriff's orders or something like that, and I was just afraid to try and do anything." [127]

(Vol. I, p. 98) "Yes, when did they start harassing you so you could not do business? A. I consider they have been doing it ever since 1930."

(Vol. I, p. 107-108) "Q. You had an account in the name of F. J. Ward? A. That is right. Q.

At the Security-First National Bank in Hollywood?
A. Hollywood and Cahuenga. Q. What did you use that account for, the account in the name of F. J. Ward? A. I used it as a banking account. Q. To pay your personal expenses and things of that kind? A. Yes. Q. To pay your department store accounts? A. Yes. Q. When did you open the account in the name of F. J. Ward? A. The bank has the record— Q. I want your recollection. A. I think I opened it in the fall of 1938. The Referee: What was the purpose of carrying the account in the name of F. J. Ward? A. Because I was having a lot of trouble at the time with my former wife and I had had my bank account attached prior to that, so I carried it in his name.”

(Vol. II, p. 17) “On or about December, 1939, I had an average balance in my bank account in the name of F. J. Ward, in excess of \$1,000.00.” The account of the bankrupt in the name of F. J. Ward, commencing December 13, 1938, up to the date of the closing of the account on August 30, 1940, consisting of four ledger sheets and two signature cards was offered in evidence as trustee’s Exhibit No. 2.

(Vol. II, p. 23) “On or about September 6, 1939, I was served with a summons and complaint in an action filed in the Superior Court of Los Angeles County, No. 444,462, entitled Martin T. O’Brien as receiver of the Reliance Bank and Trust Company, plaintiff, versus Harold C. Strotz, defendant.”

On August 21, 1940, Judge Wilson of the Superior Court in the O’Brien suit issued an order upon the bank-

rupt to show cause why he should not be restrained from transferring, hypothecating, or creating any lien upon any and all moneys, credits, or other things of value owned [128] by or in possession or under the control of the Security-First National Bank of said Harold C. Strotz (Vol. II, p. 39-40), was returnable August 30, 1940, and was served on the bankrupt August 28, 1940. At the time of the service of the rule on the bankrupt on August 28, 1940, there was a balance in the "Ward" bank account of \$676.57. On September 6, 1940, bankrupt filed his affidavit in opposition to the order to show cause, in which he stated that he did not have a bank account at the Security-First National Bank of Los Angeles at the time of the service of the order (Vol. II, p. 39-40).

F. J. Ward testified (Vol. I, p. 181) that Strotz told him "there was a possibility of certain moneys of his being attached and he asked me if I would object to having that account and I said no."

During the course of the hearing the Referee made the following statements:

(Vol. II, p. 156) "The Referee: I will tell you frankly the testimony thus far that impresses me in this matter, and the only testimony that impresses me is the fact these men were very close friends, lived together in the one house. that Mr. Ward did permit Mr. Strotz to use his name to carry a bank account in, and that it was being done for the purpose of keeping funds away from Mr. Strotz's creditors, backed by the further fact that Mr. Ward knew Mr. Strotz was in financial difficulty and the fact they carried on these transactions, together with the close

relationship shown by the transactions in the oil venture—referring to the two covered by Respondent's Exhibits A and B, and shown by some of the contracts relating to the same transaction."

(Vol. II, p. 164) "The Referee: The testimony shown here that Mr. Strotz wanted to do something to prevent creditors from reaching his money, and Mr. Ward in 1938 was perfectly willing to go along with him and cooperate with him in that manner, and the Court can take that into consideration in determining whether or not he was willing to assist Mr. Strotz in protecting himself in some other [129] matters. While you can argue the matter, I am afraid you cannot make any impression on the Court on that point."

(Vol. II, p. 165) "The Referee: That may be the testimony but the view of the Court from the testimony I have heard is I am impressed with this, that Mr. Strotz was not worried about his wife attaching him one-half as much as he was about someone else attaching. Mr. Garbus: There wasn't another single solitary creditor mentioned at the time, or evidence that another creditor existed at that time. The Referee: The Court cannot accept that viewpoint."

(Vol. II, p. 169-172) "The Referee: Well, Mr. Strotz testified here, and he has been very frank about it, in substance that he put this money where it could not be attached. Mr. Garbus: Which money is that? The Referee: Put it in Mr. Ward's bank account. Mr. Garbus: There wasn't any money then—just a few hundred dollars. The Referee:

Any other construction of his testimony in that regard would certainly be a very, very strange construction."

"Mr. Garbus: Yes, but this reflects upon the bankrupt, and you know very well if it is to be brought in on the charge of fraud on the part of the bankrupt I will resist it to the last, and every attorney should. Your Honor, Mr. Strotz testified he opened this bank account solely for the purpose of giving him the opportunity not to be harassed by attachments. That is true. He made the general statement but he had in his mind his ex-wife, but that is not a wrong as far as his creditors— The Referee: Let us see whether or not it is. If he did put this money in the bank so he could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carries the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it. Mr. Garbus: Your Honor, would your Honor say then that the law is a man who is in debt must wear his heart on his sleeve, as far as his creditors are concerned? That is not the law. The law is a man in [130] debt has a right to prefer one creditor over another, he has the right to invest his money in a speculation, he has a right to buy things he needs, an automobile and clothing— The Referee: If there has been any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got money, so there is no preferring one creditor over another. They have

been all very much in the same class, they have not gotten anything, as far as the testimony is concerned.”

The Referee should have found:

“That the bankrupt from October 22, 1939, until August 30, 1940, being within a period of twelve months immediately preceding the filing of the petition in bankruptcy, maintained a bank account in the name of F. J. Ward for the purpose of concealing from his creditors money deposited and maintained therein with intent of hindering, delaying, and defrauding his creditors, and putting his property beyond the reach of his creditors, in which said bank account during said period the bankrupt made 34 deposits aggregating \$16,910.77 and issued 183 checks aggregating \$17,341.30.”

(i) Findings 20 and 21 are contradicted by the following uncontradicted evidence and admissions made by the bankrupt. Anne Gould Strotz, the wife of the bankrupt, died September 13, 1938 (Vol. I, p. 36). The bankrupt was appointed executor for her estate by the Superior Court of Los Angeles, California, October 25, 1938, and no inventory was filed until March 12, 1940 (Vol. I, p. 309). From the time of his appointment as executor until March 1940, the bankrupt received, as executor of the estate, approximately \$18,000 (Vol. I, p. 36). The bankrupt testified as follows:

(Vol. I, p. 140) “I received the first of this money in 1939, and the last of it in February, 1940. With this money, I went to Honolulu and to New York and to Chicago, and I tried to make arrangements to settle my other accounts.”

(Vol. I, p. 141) "Most of this money I kept in cash. I may have [131] deposited one or two thousand dollars in the account I had in the name of F. J. Ward. When I say I kept it in cash I mean cashier's checks drawn on the Security-First National Bank. I received the money at different times. I used some of it for living expenses and some for trips."

(Vol. I, p. 304-305) "Mr. Dechter: Q. Mr. Strotz, I will show you a letter written by your counsel, Simon and Garbus, to William J. Curren dated October 23, 1939 in re Martin T. O'Brien, and so forth, versus Harold C. Strotz.

" 'Dear Mr. Curren: This is to confirm our understanding that the defendant in the above-entitled action need not answer the complaint on file herein or otherwise plead in said action until you give to this office notice requesting him so to do. We understand that in the meantime you will advise this office as to the attitude of your client in extending the prosecution of this action to preparations for settlement of this matter.

Yours very truly, Simon and Garbus by Morton Garbus.'

Does that refresh your memory you withdrew this \$11,500 after this action was pending against you? Mr. Garbus: What is the date of that letter? A. October 23, 1939. Mr. Garbus: That is nearly six months, isn't it? Mr. Dechter: Will you read the question? (The reporter read the pending question.) A. Well, of course I withdrew it afterwards, if that is the date of the letter."

(Vol. I, p. 308-309) "Mr. Dechter: Q. Mr. Strotz, I will show you the ledger sheet of the Security-First National Bank, Hollywood and Cahuenga Branch, which shows that you made the following deposits to the account of the estate of *Ann G. Strotz*: October 29, 1938, \$1,562; November 28, 1938, \$447.77; April 21, 1939, \$3,000.00; June 13, 1939, \$15,000.00.

The witness calls my attention to the fact I missed a dollar deposit on May 5, 1939. June 29, 1939, \$5,000.00; November 9, 1939, \$5.87; December 14, 1939, \$300.00; February 26, 1940, \$16,948.12; or a [132] total of approximately a sum in excess of \$40,000.00 between those dates."

(Vol. II, p. 45-46) "I issued a check on the Hollywood and Cahuenga Branch of the Security-First National Bank of Los Angeles to the estate of Anne Gould Strotz by Harold C. Strotz, executor, for \$11,500.00, payable to the order of myself. I took this check and received in return for the same cashier's checks aggregating the sum of \$11,500.00."

(Vol. II, p. 49) "I took this money out to pay certain bills, and I drew it out because I will admit I was afraid my bank account might be attached in some form or other."

(Vol. II, p. 50) "At the time I drew this money from the estate account, I kept it in cashier's checks. I had this checking account in the name of F. J. Ward."

(Vol. II, p. 51) "I have been insolvent since December, 1929."

(Vol. II, p. 95) Witness shown check dated October 20, 1939, drawn on the estate of Anne G. Strotz account for \$1,000.00 and testified (p. 96) that it was drawn without a court order. The check was made payable to Harold Strotz.

(Vol. II, p. 97) "I don't know what I did with that particular money."

(Vol. II, p. 98) Bankrupt shown check of estate dated July 1, 1939, payable to bankrupt in the sum of \$4,000.00."

(Vol. II, p. 99) "I did not have a court order from the probate court of Los Angeles County authorizing that withdrawal. I believe I took \$2,000.00 of this money with me to Honolulu. I have no record of what I did with it. This withdrawal of \$4,000.00 on July 1, 1939, was made after I deposited \$5,000.00 in the account of the estate of Anne Gould."

(Vol. II, p. 102) "I was the residuary beneficiary of the estate and withdrew funds from the estate account from time to time and used those funds for my personal benefit." [133]

(Vol. II, p. 103) "The estate of Anne Gould was opened in October, 1938, and no inventory was filed until March 12, 1940."

(Vol. II, p. 113-114-115-116) Bankrupt shown check (trustee's Exhibit No. 6) for \$11,500.00 drawn on the estate account of Anne G. Strotz payable to bankrupt and bankrupt testified that in exchange for this check he received the following cashier's checks.

dated February 26, 1940: Check No. 777,205 for \$3,600.00 payable to Harold C. Strotz. Check No. 777,207 for \$1,500.00 payable to Harold C. Strotz. Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt for \$3,000.00. Check No. 777,201 payable to Bekins Van & Storage Company for \$800.00. Check No. 777,202 payable to Guy M. Peters for \$500.00. Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00. These checks total \$9,700.00. "I don't remember whether I received the balance of the \$11,500.00 in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940."

(Vol. II, p. 116) "With reference to the check made out to my brother, Sidney M. Strotz for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for \$3,000.00 drawn on the First National Bank of Chicago."

(Vol. II, p. 177) "When the personal check for \$3,000.00 was received back from my brother, I deposited it in the bank account I had in the name of F. J. Ward. When I received this personal check of my brother's for \$3,000.00 he said he would not accept it as I needed it more than he did. I sailed for Honolulu July 27, 1939, and returned September 13, 1939."

The Referee should have found:

"20. That said bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500.00, which he with-

drew from the bank account of the Estate of Anne Gould Strotz, his deceased wife, for the purpose of putting the same beyond the reach of creditors; and that such concealment took place and continued to within one year preceding the filing of the petition in bankruptcy herein.

“21. That said bankrupt, within one year preceding the filing of the bankruptcy petition herein, failed to file any inventory and appraisal in the estate of Anne Gould Strotz, deceased, pending in the Superior Court of Los Angeles County, for the purpose of concealing from his creditors the fact that there were assets in said estate, and the fact that his interest in said estate was of some value, all with intent to hinder, delay and defraud his creditors; and failed to file an inventory in said estate until after he had appropriated and disposed of, to his own use and benefit, moneys and property to which he was entitled as the heir of said estate.”

(j) That portion of finding 23 which reads:

“and the Court further finds that since August 12, 1930 to the date of the filing of the petition in bankruptcy herein, October 22, 1940, the bankrupt had and received no assets or money of any consequence excepting the sum of Eleven thousand five hundred and 00/100 Dollars (\$11,500.00) as heir of the estate of his deceased wife, Anne Gould Strotz, which sum was expended by him for his living expenses and to meet certain of his obligations, as aforesaid.”

is erroneous. Said finding is contradicted by the admissions of the bankrupt and uncontradicted evidence hereinbefore set forth.

(k) Finding 25 is erroneous for the reason that by the admissions of the bankrupt and uncontradicted evidence the objections of the Reconstruction Finance Corporation are amply sustained. The Referee in making said finding has disregarded the provisions of section 14(c) of the Bankruptcy Act placing upon the bankrupt the burden of proof that he has not committed any of such acts after the objector has shown that there are reasonable grounds for believing that the bankrupt has committed same.

(l) Finding 26 is erroneous and incomplete. The Referee [135] should have found:

“Said claim of Eugenia Vollentine is based upon five notes dated January 14, 1932, due two, three, and four years after date. In the State of California the Statute of Limitations upon a note is four years. The bankrupt for a period of more than four years immediately preceding the filing of his petition in bankruptcy was a resident of the State of California. It is the settled law of the State of California that an action brought on a note in the State of California against a resident of the State of California, executed in a foreign state, is controlled by the California four-year Statute of Limitations. *Sullivan vs. Shannon*, 25 Cal. App. 2d 422, 77 Pac. 2d 422, and cases therein cited.”

(m) Finding 26a is unsupported by the record.

XII.

Petitioner having shown that there were reasonable grounds for believing that the bankrupt committed the

said acts which would bar his discharge and the bankrupt having failed to furnish a satisfactory explanation, it was mandatory upon the Referee to enter an order denying the bankrupt's discharge.

XIII.

The Referee erred in overruling the objections of petitioner to the bankrupt's discharge and granting to the bankrupt a discharge.

XIV.

The Referee erred in allowing the said claim of Eugenia Vollentine.

XV.

The Referee erred in approving the amended plan of the bankrupt.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same be reviewed as provided in Section 39 C of the Bankruptcy Act.

RECONSTRUCTION FINANCE CORPORATION

By FRANK MICHELS

Its Attorney and Authorized Agent in This
Behalf. [136]

[Verified.]

[Endorsed]: Filed Dec. 12, 1942 at 20 min. past 10 o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed Dec. 30, 1942. [137]

[Title of District Court and Cause.]

OBJECTIONS OF RECONSTRUCTION FINANCE CORPORATION TO CERTIFICATE FILED BY REFEREE ERNEST R. UTLEY UPON ITS PETITION TO REVIEW THE ORDERS ENTERED BY SAID REFEREE DECEMBER 2, 1942 AND PROPOSED SUMMARY OF EVIDENCE.

Now comes Reconstruction Finance Corporation, a corporation created by act of Congress of the United States of America, by J. J. Lieberman and Frank Michels, its attorneys, and objects to the certificate filed herein by Referee Ernest R. Utley upon its petition to review the orders entered by said Referee on December 2, 1942, for the reason that said Referee's certificate does not contain a complete or adequate statement of the questions presented or a summary of the evidence as required by sec. 39a (8) of the Bankruptcy Act.

Questions Presented

The questions presented are:

1. Whether the bankrupt committed the following acts included in the specification of the objections of the Reconstruction Finance Corporation to the bankrupt's discharge: (a) failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained; (b) at any time subsequent to the first day of twelve months immediately preceding the filing of the petition in bankruptcy concealed or permitted to be concealed any of his property with intent to hinder, delay, or defraud his creditors.

2. Whether the Referee can arbitrarily disregard the admission of the bankrupt that he was guilty of said acts. [153]

3. Whether a plan submitted by the bankrupt under sec. 321 of Chapter XI of the Bankruptcy Act, after the filing of objections to the discharge, for the purpose of bargaining with his creditors and the court for his discharge is made in good faith.

4. Whether the claim of Eugenia Vollentine should be allowed or whether it is barred by the Statute of Limitations of the State of California.

5. Whether the claim of Eugenia Vollentine, if it was barred by the Statute of Limitations, should be permitted to vote upon the plan and participate in the distribution of the assets of the estate.

Proposed Summary of Evidence Submitted
By Reconstruction Finance Corporation
Summary of Evidence

Harold C. Strotz, the bankrupt, was a resident of the Southern District of California for more than four years prior to the filing of his voluntary petition in bankruptcy herein on October 22, 1940. During said period the bankrupt was interested in the operation of various oil companies and negotiated several oil royalty contracts. The total number of claims filed in this proceeding amounted to \$974,848.64. One claim, that of the estate of John T. Cunningham in the sum of \$245,811.25, was disallowed, leaving claims amounting to \$729,037.39.

Included in the remaining claims filed aggregating \$729,037.39 is the claim of Eugenia Vollentine which was

based upon five notes executed in the State of Illinois, dated January 14, 1932, due two, three, and four years after date. In the State of California the Statute of Limitations upon a note is four years. Under the law of the State of California, as held in the case of *Sullivan v. Shannon*, 25 Cal. App. 2d 422, 77 Pac. 2d 422, and cases therein cited, an action brought on a note in [154] said State against a resident of said State, executed in a foreign State, is subject to the four-year Statute of Limitations of said State. The Reconstruction Finance Corporation objected to said claim upon the ground that same was barred by the Statute of Limitations of the State of California. The claim of the Reconstruction Finance Corporation was filed herein for the sum of \$340,566.45 and is based upon a judgment rendered December 30, 1940, by the Appellate Court of Illinois against the bankrupt, John T. Cunningham and others and was based upon a joint and several note signed by the defendants dated August 12, 1930. This judgment was later affirmed by the Supreme Court of Illinois, the court of last resort in said State. If the claim of Eugenia Vollentine is allowed, the claim of the Reconstruction Finance Corporation should represent over 45 per cent of the total of claims. If the objections to the claim of Eugenia Vollentine are sustained the claim of the Reconstruction Finance Corporation would be more than 50 per cent of the aggregate of all other claims filed.

On March 19, 1941, the Reconstruction Finance Corporation filed objections to the discharge of the bankrupt upon various grounds, in which it was specified that the bankrupt committed, among others, the following acts which would bar his discharge:

1. He failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained.

2. That he, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, or concealed, or permitted to be removed or concealed his property with intent to hinder, delay, or defraud his creditors.

On April 31, 1941, the bankrupt filed a plan of [155] arrangement under the provisions of Section 321 of Chapter XI of the Bankruptcy Act. On July 2, 1941, the bankrupt filed an amended plan of arrangement to which the creditors objected and later, on May 27, 1942, bankrupt filed an amendment to his petition for arrangement as amended, under the terms of which he offered to his creditors the sum of \$32,000. The Reconstruction Finance Corporation objected to this plan of arrangement.

The evidence shows that the bankrupt is the son of Charles Nicolas Strotz who was at the time of his death a resident of Chicago, Illinois, and whose will was probated in the Probate Court of Cook County, Illinois, under which will a trust was created of which the First National Bank of Chicago and the bankrupt are the trustees. The corpus of the said trust is approximately one million dollars and the annual income therefrom is over \$30,000 (Vol. I, p. 17 transcript). Said trust under its terms terminates upon the death of the mother of the bankrupt, and upon the happening of said contingency the bankrupt, if he survives his mother, under the terms of said will receives one-third of the corpus of said trust. An assignment of the said future interest of the

bankrupt in said trust was made many years prior to the filing of the petition in bankruptcy, to a creditor whose claim has not been filed in this proceeding. Said trust agreement contains a spendthrift clause which prohibits the assignment of the interest of any of the beneficiaries under said trust during the term of its existence, and under the laws of the State of Illinois said provision is valid and said assignment is void.

The bankrupt admitted in his testimony that from December 13, 1938, to August 30, 1940, he maintained a bank account in the name of F. J. Ward at the Security-First National Bank at Los Angeles, California. During said period he made 66 deposits aggregating \$26,260.16 and drew 308 checks aggregating \$26,260.16 [156] (Exhibit 2). Each month he destroyed the canceled checks and kept no books or records covering said transactions. The bankrupt with respect to this bank account testified:

(Vol. I, p. 30) "I had a bank account in the Security-First National Bank of Los Angeles, Hollywood and Cahuenga Branch. The account was in the name of F. J. Ward and checks were signed by myself for Mr. Ward."

(Vol. I, p. 39) "This account was closed in August or September of 1940."

(Vol. I, p. 94) "The reason for that was that I was continually harassed by sheriff's orders or something like that, and I was just afraid to try and do anything."

(Vol. I, p. 98) "Yes, when did they start harassing you so you could not do business? A. I consider they have been doing it ever since 1930."

The evidence (Exhibit 2) disclosed that within a period of twelve months immediately preceding the filing of the petition in bankruptcy the bankrupt made 34 deposits in this bank account aggregating \$16,910.77 and issued 183 checks against said account aggregating \$17,341.30.

On September 6, 1939, the bankrupt was served with a summons and complaint in an action filed in the Superior Court of Los Angeles County entitled *Martin T. O'Brien, as Receiver of the Reliance Bank and Trust Company, v. Harold C. Strotz* (Vol. II, p. 23). On October 23, 1939, an agreement was made between the bankrupt and this creditor that until further notice the bankrupt would not be required to answer this complaint so as to afford to the bankrupt an opportunity to make a settlement (Vol. I, p. 304-305). On August 21, 1940, Judge Wilson of the Superior Court in said case issued an order upon the bankrupt to show cause why he should not be restrained from transferring, hypothecating, or creating any lien upon any and all moneys, [157] credits, or other things of value owned by or in possession or under the control of the Security-First National Bank of said Harold C. Strotz (Vol. II, p. 39-40). This order was returnable August 30, 1940, and was served on the bankrupt August 28, 1940. At the time of the service of the rule on the bankrupt on August 28, 1940, the bankrupt had \$676.57 in the "Ward" bank account. On September 6, 1940, bankrupt filed his affidavit in opposition to the order to show cause, in which he denied that he had a bank account at the Security-First National Bank of Los Angeles at the time of the service of the order (Vol. II, p. 39-40).

The wife of the bankrupt, Anne Gould Strotz, died September 13, 1938 (Vol. I, p. 36). The bankrupt was the residuary legatee under her will. The bankrupt was appointed executor of her estate October 25, 1938, and no inventory was filed until March 12, 1940 (Vol. I, p. 309). From the time of his appointment as executor until March 1940, the bankrupt received, as executor of the estate, approximately \$19,000 (Vol. I, p. 36). The bankrupt testified as follows:

(Vol. I, p. 140) "I received the first of this money in 1939, and the last of it in February, 1940. With this money, I went to Honolulu and to New York and to Chicago, and I tried to make arrangements to settle my other accounts."

(Vol. I, p. 141) "Most of this money I kept in cash. I may have deposited one or two thousand dollars in the account I had in the name of F. J. Ward. When I say I kept it in cash I mean cashier's checks drawn on the Security-First National Bank. I received the money at different times. I used some of it for living expenses and some for trips."

The bankrupt further testified with respect to funds he withdrew from his wife's estate as follows: [158]

(Vol. II, p. 45-46) "I issued a check on the Hollywood and Caluenga Branch of the Security-First National Bank of Los Angeles of the estate of Anne Gould Strotz by Harold C. Strotz, executor, for \$11,500.00, payable to the order of myself. I took this check and received in return for the same cashier's checks aggregating the sum of \$11,500.00."

(Vol. II, p. 49) "I took this money out to pay certain bills, and I drew it out because I will admit I was afraid my bank account might be attached in some form or other."

(Vol. II, p. 50) "At the time I drew this money from the estate account, I kept it in cashier's checks. I had this checking account in the name of F. J. Ward."

(Vol. II, p. 51) "I have been insolvent since December, 1929."

(Vol. II, p. 95) Witness shown check dated October 20, 1939, drawn on the estate of Anne G. Strotz account for \$1,000.00 and testified (p. 96) that it was drawn without a court order. The check was made payable to Harold Strotz.

(Vol. II, p. 97) "I don't know what I did with that particular money."

(Vol. II, p. 98) Bankrupt shown check of estate dated July 1, 1939, payable to bankrupt in the sum of \$4,000.00.

(Vol. II, p. 99) "I did not have a court order from the probate court of Los Angeles County authorizing that withdrawal. I believe I took \$2,000.00 of this money with me to Honolulu. I have no record of what I did with it. This withdrawal of \$4,000.00 on July 1, 1939, was made after I deposited \$5,000.00 in the account of the estate of Anne Gould." [159]

(Vol. II, p. 102) "I was the residuary beneficiary of the estate and withdrew funds from the estate account from time to time and used those funds for my personal benefit."

(Vol. II, p. 103) "The estate of Anne Gould was opened in October, 1938, and no inventory was filed until March 12, 1940."

(Vol. II, p. 113-114-115-116) Bankrupt shown check (trustee's Exhibit No. 6) for \$11,500.00 drawn on the estate account of Anne G. Strotz payable to bankrupt and bankrupt testified that in exchange for this check he received the following cashier's checks, dated February 26, 1940: Check No. 777,205 for \$3,600.00 payable to Harold C. Strotz. Check No. 777,207 for \$1,500.00 payable to Harold C. Strotz. Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt for \$3,000.00. Check No. 777,201 payable to Bekins Van & Storage Company for \$800.00. Check No. 777,202 payable to Guy M. Peters for \$500.00. Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00. These checks total \$9,700.00. "I don't remember whether I received the balance of the \$11,500.00 in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940."

(Vol. II, p. 116) "With reference to the check made out to my brother, Sidney M. Strotz for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for \$3,000.00 drawn on the First National Bank of Chicago."

(Vol. II, p. 177) "When the personal check for \$3,000.00 was received back from my brother, I deposited [160] it in the bank account I had in the name of F. J. Ward. When I received this personal check of my brother's for \$3,000.00 he said he would

not accept it as I needed it more than he did. I sailed for Honolulu July 27, 1939, and returned September 13, 1939."

Objections to Findings by Referee in His Certificate Under Heading "Evidence"

At page 3, lines 26 to 32, the Referee lists seven cashier's checks aggregating \$11,500 covering withdrawals from the account of the Estate of Anne Gould Strotz, deceased, on February 26, 1940. At page 4, lines 8 and 9, the Referee states, "the bankrupt's testimony discloses that a number of these checks were issued to creditors." It appears from the listing of said checks by the Referee (p. 3) that two of said checks, one for \$3600 and one for \$1500, were issued to the bankrupt. Another of said checks was issued to the bankrupt's brother in the sum of \$3000. The bankrupt testified:

(Vol. II, p. 116) "With reference to the check made out to my brother, Sidney M. Strotz for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for \$3,000.00 drawn on the First National Bank of Chicago."

The following statement is made by the Referee at page 5 of his certificate:

"No creditor, other than those two mentioned, was in a position to levy upon the bankrupt's bank account from the time the account in the name of F. J. Ward was opened in 1938 until the same was closed. If the bankrupt feared a levy of attachment or execution by any person other than his former wife, no mention is made of such person by name." [161]

The record shows that on September 6, 1939, the bankrupt was served with a summons and complaint in an action filed in the Superior Court of Los Angeles County entitled *Martin T. O'Brien, as Receiver of the Reliance Bank and Trust Company, v. Harold C. Strotz* (Vol. II, p. 23). On October 23, 1939, an agreement was made between the bankrupt and this creditor that until further notice the bankrupt would not be required to answer this complaint and in the meantime the bankrupt would attempt to make a settlement (Vol. I, p. 304-305). On August 21, 1940, Judge Wilson of the Superior Court in said case issued an order upon the bankrupt to show cause why he should not be restrained from transferring, hypothecating, or creating any lien upon any and all moneys, credits, or other things of value owned by or in possession or under the control of the Security-First National Bank of said Harold C. Strotz (Vol. II, p. 39-40), was returnable August 30, 1940, and was served on the bankrupt August 28, 1940. At the time of the service of the rule on the bankrupt on August 28, 1940, the bankrupt had \$676.57 in the "Ward" bank account. On September 6, 1940, bankrupt filed his affidavit in opposition to the order to show cause, in which he denied that he had a bank account at the Security-First National Bank of Los Angeles at the time of the service of the order (Vol. II, p. 39-40).

The objections to the findings of the Referee generally are set forth in the Petition for Review.

RECONSTRUCTION FINANCE CORPORATION

By Jacob J. Lieberman
Frank Michels

Its Attorneys

[Endorsed]: Filed Jan. 14, 1943. [162]

United States District Court
Southern District of California
Central Division

No. 37,302-M. In Bankruptcy.

In the Matter of

HAROLD C. STROTZ,

Bankrupt.

MEMORANDUM AND ORDER RE-REFERRING
PROCEEDINGS TO REFEREE.

This is a review of the referee's order dated December 2, 1942, overruling numerous objections by petitioner on review, Reconstruction Finance Company, to an amended plan of arrangement under Chapter XI of the National Bankruptcy Act, and approving said plan proposed by the bankrupt. (For brevity, petitioner on review is hereinafter referred to and called R.F.C.).

From the record and the evidence before us the following factual situation is revealed: On October 22, 1940, the bankrupt, Harold C. Strotz, filed a voluntary petition in bankruptcy and on the following day was adjudicated a bankrupt. Schedules attached to the petition show liabilities of \$1,881,830.86, and assets totaling \$625.00. A substantial portion of the liabilities resulted from the bankrupt's financial losses in the stock market and as a further result of statutory liability imposed upon the bankrupt as a former officer and director of banks in Chicago, Illinois.

The claim of R.F.C., now amounting to \$340,566.44, and allowed by the referee, is based upon a promissory note dated August 12, 1930, signed by the bankrupt and

nine other directors of the Madison Square Bank in Chicago, Illinois, upon which note the Madison Square Bank received [163] from the payee, the Central Republic Bank and Trust Company, a check for \$210,000.00. Thereafter the Central Republic Bank and Trust Company pledged the note to R.F.C. as part security for a loan in the sum of \$90,000,000.00.

Within the time allowed for filing, eleven claims totaling \$974,848.64, were filed in the bankruptcy proceedings. One claim in the sum of \$245,811.25 was rejected, leaving allowed claims in the sum of \$729,037.39. Among the claims filed and not objected to by the trustee, and which was allowed by the referee, is the claim of W. E. Deming, agent for Eugenia Volentine, in the sum of \$168,410.85, based upon five promissory notes executed by the bankrupt in Chicago on January 14, 1932, due two, three and four years after date of execution and payable at Taylorville, Illinois.

On March 21, 1941, R.F.C. filed its specifications of objections to discharge and alleged therein, but without mention of the so-called Vollentine claim, that the bankrupt failed to keep or preserve books of account and records, and that he failed to explain satisfactorily his deficiency of assets, and that the bankrupt subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy by numerous specified acts transferred, destroyed and concealed his property with intent to hinder, delay or to defraud his creditors. Prior to a complete determination of these objections, the bankrupt on April 30, 1941 filed a petition for an arrangement of his obligations under Chapter XI of the National Bankruptcy Act, and offered his creditors the sum of

\$10,000.00, together with a ten per cent interest which he may have had as a beneficiary under the last will and testament of his father, which will contained spendthrift provisions against [164] anticipating or assigning the same.

On July 2, 1941, an amended petition of arrangement was filed in substance similar to the original plan except that \$25,000 obtainable by bankrupt by loan from his stepson was offered to the creditors. To this R.F.C. filed objections and alleged those matters set forth in its original objections to the bankrupt's discharge. On May 27, 1942 the bankrupt again amended his petition for an arrangement by including an offer of an additional \$7,000, thereby offering to his creditors a total of \$32,000 borrowed money, in addition to the ten per cent in the will of his deceased father. The latter plan was accepted by all creditors whose claims had been allowed by the referee, except R.F.C., which objected to the plan upon the grounds that the bankrupt had committed the acts specified in the previous objections to discharge, and upon an additional ground that the Volentine claim, because barred by the statute of limitations was not an allowable claim and that, eliminating this claim, a majority in number and amount required by section 362 of the Bankruptcy Act had failed to accept the proposed plan of arrangement. The referee found that the evidence in support of the objections to the bankrupt's discharge was insufficient to warrant denying a discharge and that therefore refusal of confirmation of the bankrupt's plan of arrangement is not justified by the record. The referee further concluded that as an action could be maintained in Illinois upon the promissory notes constituting the Vollentine claim because the Illinois stat-

ute of limitations had not run against such notes, the requisite majority in number and amount had duly approved the proposed plan.

As the statute of limitations applicable is that [165] of the State of California and not that of the State of Illinois, we are unable to agree with the latter conclusion of the referee, and it therefore becomes unnecessary to consider the other alleged errors asserted by R.F.C.

Section 362 of the Bankruptcy Act relates to the acceptance and confirmation of a proposed arrangement and requires that an application for the confirmation of the arrangement may be filed only after the plan has been accepted in writing by a majority in number and amount of all creditors affected by the arrangement whose claims have been previously proved and allowed. Section 307 of the Act provides in effect that "creditors" shall include holders of all unsecured claims of whatever character against a debtor whether or not provable under section 63 of the Act; and "debts" or "claims" shall include unsecured demands of whatever character whether or not provable under said section 63. The proceeding before the court is not one in the nature of an arrangement for an extension of time for payment of debts in full and, in our opinion, section 302 relating to the applicability of the other provisions of the Bankruptcy Act apply so as to affect provability of a claim or at least the allowability of a claim where it is barred by the statute of limitations. *In re Lipman*, 94 Fed. 353; *In re Resler*, 95 Fed. 804; *In re Putnam*, 193 Fed. 464, affirmed 194 Fed. 793; *Collier on Bankruptcy*, 14th Ed., Vol. 3, p. 1801, et seq.

Although enforcement of the *Vollentime* claim may not have been barred under the Illinois ten-year statute of

limitations, section 17, chapter 83, Revised Statutes, Illinois, 1921, nevertheless the statute of limitations controlling the allowance of the claim is that of the state in which the bankruptcy proceedings are pending. In re [166] Povill, 105 F. (2d) 157, (C. C. A. 2); In re German American Improvement Co., 3 F. (2d) 572, (C. C. A. 2); Biggs, Com'r vs. Mays, 125 F. (2d) 693, (C. C. A. 8). The limitation on the time of judicial enforcement of claims is procedural and is governed by the law of the forum, McElmoyle v. Cohen, 38 U. S. 312.

In California where a citizen of another state creates an obligation in writing in the state of his domicile and later removes his residence to California, the four-year statute of limitations begins to run in his favor upon his removal to California so as to finally bar recovery upon the obligation, although it may yet have been payable in the former state. McKee v. Dodd, 152 Cal. 637; Dougall v. Schulenberg, 101 Cal. 154; Sullivan v. Shannon, 25 Cal. App. (2d) 422; Chappell v. Thompson, 21 Cal. App. 136. The bankrupt having removed his residence to this state in 1934, the California four-year statute of limitations would bar consideration of the so-called *Vollentime* obligation as a provable and allowable claim within the meaning of section 63 of the Act if residence in the State of California for the whole applicable period is established by satisfactory evidence.

The fact that the notes evidencing the obligations contained "confession of judgment" provisions does not operate to estop the assertion of the defense of the statute of limitations. Such provisions would not authorize a "confessed judgment" and the creator of the obligation

may still avail himself of the defense. *Harper v. DeWitt*, 10 Cal. (2d) 467; *First National Bank v. Terry*, 103 Cal. App. 501.

It appears from the record before us that the bankrupt does not deny that an interested creditor, such as [167] R.F.C. in this matter, may oppose a claim by setting up the statute of limitations as a barrier to its effective allowance by the court in considering a plan of arrangement under Chapter XI of the Bankruptcy Act. Such is the necessary and established right of petitioner on review.

Section 57(d) of the Act provides that claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court. Such claims and no others are to be allowed by the referee. Bankruptcy proceedings are largely a matter of administration by the referee, and the above section especially imposes upon the referee a duty to see that an estate or the fruits of an arrangement in bankruptcy is not distributed among those who fail to prove their legal right to share therein. A referee is more than an arbitrator in matters referred to him. He has the duty to examine the proofs filed and to determine their legal sufficiency. *In re Owl Drug Co.*, 84 F. (2d) 342, (C. C. A. 9); *In re Gobel Boat Co.*, 190 Fed. 92; *In re Noble*, 15 F. Supp. 648; and when a creditor in some form calls the attention of the court to a patently stale claim, the referee should sua sponte under the provisions of sections 2(2) and 57(k) examine it and determine its validity—and this the referee should do whether the trustee or the objecting creditor raises specific objections to the sufficiency of the proof filed or not.

Our examination of the voluminous record before us on this review shows that it is not sufficiently clear and certain to establish or disestablish as to whether the so-called Vollentine claim may properly be allowed and counted in determining whether adequate creditors have accepted the bankrupt's plan of arrangement.

Accordingly this matter is rereferred to the referee [168] to proceed in accordance with the views herein expressed and to determine the ultimate validity and effectiveness of the so-called Vollentine claim. Exceptions allowed bankrupt, trustee and Reconstruction Finance Corporation.

Dated May 15, 1943.

PAUL J. McCORMICK
United States District Judge.

Order entered May 15, 1943. Docketed May 15, 1943. Book 16, page 684. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy.

Notation made in Bankruptcy Docket on May 15, 1943, pursuant to Rule 79(a), Civil Rules of Procedure.

Edmund L. Smith,
Clerk U. S. District Court. Southern District
of California

By B. B. Hansen,
Deputy.

[Endorsed]: Filed May 15, 1943. [169]

[Title of District Court and Cause.]

BRIEF OF RECONSTRUCTION FINANCE CORPORATION OF FACTS UPON ITS OBJECTIONS TO BANKRUPT'S DISCHARGE AND PLAN OF ARRANGEMENT

This matter remains pending on the original petition of the RFC, a creditor of the bankrupt, who filed its claim herein for \$340,566.45, to review orders entered by Referee Utley December 2, 1942, as follows:

1. Granting a discharge to the bankrupt and overruling the objections of the RFC thereto.
2. Confirming a plan submitted by the bankrupt under Section 321 of Chapter XI of the Bankruptcy Act and overruling the objections of the RFC to said plan.
3. Allowing a claim of Eugenia Vollintine for \$168,410.85 and overruling the objections of the RFC to said claim for the reason that same was barred by the statute of limitations.

The record discloses the following:

October 22, 1940, voluntary petition in bankruptcy filed.

March 19, 1941, RFC filed objections to discharge of bankrupt. The specifications upon which the RFC now relies are (a) failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained; (b) the bankrupt at a time subsequent to the first day of [170] twelve months immediately preceding the filing of the petition in bankruptcy concealed or permitted to be concealed his property with intent to hinder, delay, or defraud his creditors.

April 13, 1941, bankrupt filed plan of arrangement under Section 321 of Chapter XI offering \$10,000.

July 2, 1941, amendment to plan of arrangement filed by bankrupt offering \$25,000.

May 27, 1942, amendment to plan filed by bankrupt offering \$32,000. This is the plan which was approved by the Referee and is now before the Court.

By stipulation of the parties, the examinations had under Section 21a of the Bankruptcy Act and upon a petition of the Trustee to recover certain assets transferred to F. J. Ward were considered as evidence in support of the objections of the RFC to the bankrupt's discharge and plan of arrangement. This evidence is incorporated in two volumes, together with certain exhibits, transmitted by Referee Utley upon the original petition for review.

There is submitted herewith the relevant portions of these transcripts bearing upon the question of the objections of the RFC to the bankrupt's discharge and plan of arrangement. In addition to the transcript, Trustee's Exhibit 2 has been transmitted by Referee Utley. This exhibit has an important bearing upon this case and consists of the bank statement of the Security-First National Bank of Los Angeles showing the amount of withdrawals and deposits made by Strotz in the bank account of F. J. Ward. In our analysis of the evidence we shall discuss this exhibit. Reference will also be made to a letter of Referee Utley to counsel for the RFC dated December 2, 1942, and filed in this proceeding by leave of this Court on February 8, 1943, which, in our opinion, has an important bearing upon the matter before the Court.

The evidence taken before Referee Utley upon this question disclosed the following: [171]

That the bankrupt is the son of Charles Nicolas Strotz who was at the time of his death a resident of Chicago, Illinois, and whose will was probated in the Probate Court of Cook County, Illinois, under which will a trust was created of which the First National Bank of Chicago and the bankrupt are the trustees. The corpus of the said trust is approximately one million dollars and the annual income therefrom is over \$30,000 (Vol. I, p. 17 transcript). Said trust under its terms terminates upon the death of the mother of the bankrupt, and upon the happening of said contingency the bankrupt, if he survives his mother, under the terms of said will receives one-third of the corpus of said trust. An assignment of the said future interest of the bankrupt in said trust was made many years prior to the filing of the petition in bankruptcy, to a creditor whose claim has not been filed in this proceeding. Said trust agreement contains a spendthrift clause which prohibits the assignment of the interest of any of the beneficiaries under said trust during the term of its existence, and under the laws of the State of Illinois said provision is valid and said assignment is void.

The bankrupt admitted in his testimony that from December 13, 1938, to August 30, 1940, he maintained a bank account in the name of F. J. Ward at the Security-First National Bank at Los Angeles, California. During said period he made 66 deposits aggregating \$26,260.16 and drew 308 checks aggregating \$26,260.16 (Trustee's Exhibit 2). Each month he destroyed the canceled checks

and kept no books or records covering said transactions. The bankrupt with respect to this bank account testified:

(Vol. I, p. 30) "I had a bank account in the Security-First National Bank of Los Angeles, Hollywood and Cahuenga Branch. The account was in the name of F. J. Ward and checks were signed by myself for Mr. Ward."

(Vol. I, p. 39) "This account was closed in August or [172] September of 1940."

(Vol. I, p. 94) "The reason for that was that I was continually harassed by sheriff's orders or something like that, and I was just afraid to try and do anything."

(Vol. I, p. 98) "Yes, when did they start harassing you so you could not do business? A. I consider they have been doing it ever since 1930."

The evidence (Trustee's Exhibit 2) disclosed that within a period of twelve months immediately preceding the filing of the petition in bankruptcy the bankrupt made 34 deposits in the Ward bank account aggregating \$16,910.77 and issued 183 checks against said account aggregating \$17,341.30.

On September 6, 1939, the bankrupt was served with a summons and complaint in an action filed in the Superior Court of Los Angeles County entitled Martin T. O'Brien, as Receiver of the Reliance Bank and Trust Company, v. Harold C. Strotz (Vol. II, p. 23). On October 23, 1939, an agreement was made between the bankrupt and this creditor that until further notice the bankrupt would not be required to answer this complaint so as to afford to the bankrupt an opportunity to make a settlement (Vol. I, p.

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The wife of the bankrupt, Anne Gould Strotz, died September 13, 1938 (Vol. I, p. 36). The bankrupt was the residuary legatee under her will. The bankrupt was appointed executor of her estate October 25, 1938, and no inventory was filed until March 12, 1940 (Vol. I, p. 309). From the time of his appointment as executor until March 1940, the bankrupt received, as executor of the estate, approximately \$18,000 (Vol. I, p. 36). The bankrupt testified as follows:

(Vol. I, p. 140) "I received the first of this money in 1939, and the last of it in February, 1940. With this money, I went to Honolulu and to New York and to Chicago, and I tried to make arrangements to settle my other accounts."

(Vol. I, p. 141) "Most of this money I kept in cash. I may have deposited one or two thousand

dollars in the account I had in the name of F. J. Ward. When I say I kept it in cash I mean cashier's checks drawn on the Security-First National Bank. I received the money at different times. I used some of it for living expenses and some for trips."

The bankrupt further testified with respect to funds he withdrew from his wife's estate as follows:

(Vol. II, p. 45-46) "I issued a check on the Hollywood and Caluenga Branch of the Security-First National Bank of Los Angeles of the estate of Anne Gould Strotz by Harold C. Strotz, executor, for \$11,500.00, payable to the order of myself. I took this check and received in return for the same cashier's checks aggregating the sum of \$11,500.00."

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(Vol. II, p. 99) "I did not have a court order from the probate court of Los Angeles County authorizing that withdrawal. I believe I took \$2,000.00 of this money with me to Honolulu. I have no record of what I did with it. This withdrawal of \$4,000.00 on July 1, 1939, was made after I deposited \$5,000.00 in the account of the estate of Anne Gould."

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Guy M. Peters for \$500.00. Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00. These checks total \$9,700.00. "I don't remember whether I received the balance of the \$11,500.00 in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940."

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(Vol. II, p. 177) "When the personal check for \$3,000.00 was received back from my brother, I deposited it in the bank account I had in the name of F. J. Ward. When I received this personal check of my brother's for \$3,000.00 he said he would not accept it as I needed it more than he did. I sailed for Honolulu July 27, 1939, and returned September 13, 1939."

On August 7, 1942, Referee Utley rendered a memorandum of decision upon the question of discharge and plan in which he made many statements which were restricted by him in his subsequent order of December 2, 1942. There is one statement contained in [176] this memorandum of decision of August 7, 1942 to which we desire to direct the Court's attention. The Referee (p. 6) stated that from the evidence before the Court it appeared that the RFC had co-signers on the obligation against the bankrupt, one being the estate of John T. Cunningham, deceased, which is financially responsible and will be compelled to pay the claim of the RFC in

full whether it receives a dividend from this estate, or not, and that the RFC would therefore in no way be damaged by the approval of this plan. No such evidence appears in the record.

In Referee Utley's order of December 2, 1942 (par. 24), the Referee found that the Cunningham estate is contesting its liability in the Illinois courts upon this obligation and that even though the RFC prevailed in its claim against the Cunningham estate there would be insufficient assets to pay its claim in full. The RFC now shows and represents to the Court that no payment whatsoever has been made upon its claim, that its claim filed in this proceeding remains wholly unsatisfied.

On December 2, 1942, Referee Utley entered an order granting the bankrupt's discharge and approving the plan of arrangement. The RFC filed its petition to review the order of Referee Utley of December 2, 1942, and its specific objections to that order will be found at pages 25 to 40 of the petition for review.

On the same day that the order appealed from was rendered, Referee Utley sent a letter to counsel for the RFC, which was filed in this proceeding by leave of this Court on February 8, 1943. This letter was offered by the RFC to rebut any presumption that may be claimed as to the correctness of Referee Utley's order of December 2, 1942. In that letter he stated, "upon the cold question of whether the bankrupt would be entitled to a discharge independent of the plan of arrangement offered, I think your contention would be correct." This statement taken together with a statement found at page 7

of the original memorandum of decision of Referee Utley [177] wherein he stated,

"I do not feel that the evidence establishes a clear and convincing case of fraudulent concealment of assets as contemplated by Section 14-c of the Bankruptcy Act."

indicates that Referee Utley refused to follow the plain provisions of 14c of the Bankruptcy Act with regard to the question of burden of proof. This section does not require the objector to prove his case by "clear and convincing" evidence. It provides that the objector is required to "show to the satisfaction of the court that there are reasonable grounds for believing the bankrupt has committed" the acts. The section further provides that "then the burden of proving that he has not committed any such acts shall be upon the bankrupt."

The Referee made no finding as to whether "there are reasonable grounds" to believe that the bankrupt committed the acts charged and did not state or find whether the bankrupt had sustained the burden placed upon him by Section 14c to show that he has not committed such acts.

The Referee did state in his letter of December 2, 1942 that upon the question of whether the bankrupt would be entitled to his discharge independent of the plan of arrangement, he considered our objections to the discharge good. This indicates the Referee refused to follow the provisions of the Act which provides that a plan shall not be approved if "the debtor has been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt." If

the Referee, as stated in this portion of his letter, found that the objections of the RFC were sound, it was mandatory upon him to deny the discharge and disapprove the plan.

The evidence bearing upon the question of discharge was proven by the unqualified admissions of the bankrupt. He admitted that the purpose of depositing his money in the Ward bank account [178] was to avoid "attachment" by creditors. There was no conflict of the evidence upon that issue.

In the letter of December 2, 1942, the Referee further stated:

"However, I cannot bring myself to the point, under the facts in this case, of saying that the bankrupt is not entitled to a discharge when it would mean, in effect, that I would literally pitch into the fire \$32,000.00, which all creditors except the Reconstruction Finance Corporation, have expressed a desire to have and which they would not get if his discharge were denied. I feel that such an order would be of greater punishment to the creditors than to the bankrupt and would be a far greater detriment to them. Possibly this position forces me to require stricter proof upon the question of discharge in so far as the objector is concerned, than I would otherwise require but if creditors are to be denied the right to the funds in question, under the circumstances of the case, I much prefer that a higher court makes such an order."

Here the Referee states that he has required "stricter proof" from the RFC because of the fact that the other creditors accepted the plan. Here again the Referee in-

licated that he did not follow the provisions of 14c of the Bankruptcy Act under which the burden of proving that he has not committed any acts to prevent his discharge is upon the bankrupt, when it appears from the evidence of the objector that there are reasonable grounds for believing the bankrupt has committed such acts. The RFC is the largest individual creditor who has filed a claim against this estate. If the Vollintine claim is disallowed, its claim will exceed the aggregate of all other claims. Under the terms of the plan, costs of administration are first deducted. The amount of any dividend paid under the plan would be very small. The RFC, because of the amount of its claim, is the party whose interest is affected by the plan more than that of any other individual creditor. In this connection we desire to direct the Court's attention to the fact that after this case was re-referred to the Referee by this Court, that upon the hearing before Referee Laugharn one of the creditors who originally accepted the plan filed his written withdrawal of his [179] consent thereto.

A case arose in the Seventh Circuit upon almost the identical statement of facts in the case of *In re Manasse*, 125 Fed. 2d 647, C. C. A. 7th Cir. decided March 5, 1942. The facts in that case were as follows:

"Appellant married in June 1933, and a few days thereafter, a checking account was opened in the name of his wife with her personal funds in the amount of \$250. (The record elsewhere shows that on the day following their marriage, her mother gave her the sum of \$1500 which represented savings by the mother from contributions made by her out of her earnings for the eight years preceding.) Appellant

had a power of attorney in this account and used it in all ways as his own, signing checks and depositing and withdrawing funds, his own and those of his clients. The same system was employed with respect to other bank accounts opened from time to time with funds of the wife to take the place of accounts closed for various reasons. For a period of about three years, to January 1938, appellant and his wife maintained a joint checking account, but with the exception of this, appellant's name never appeared on any of the accounts although he used each account in his wife's name very extensively in carrying on his profession." (p. 648)

The objections to the bankrupt's discharge were failure to keep books and concealment of assets within twelve months preceding the filing of the bankruptcy petition.

The court in sustaining the objections to the discharge said (p. 650):

"We are convinced that, in spite of appellant's assertion to the contrary, the evidence of appellant himself amply supports the conclusion of the referee [180] that 'the account in question was opened not for the purpose of protecting the wife's money from the claim of creditors of the bankrupt, but was maintained for the purpose of placing the money of the bankrupt beyond the reach of his creditors, and that the whole purpose of the bank account and of the account shown on the bankrupt's books was to enable the bankrupt to have a convenient place of depositary for his funds, which being ostensibly the property of the wife was not subject to execution on behalf of his creditors. It is difficult to believe

that if the bankrupt were not hopelessly insolvent, he would have adopted the device he did adopt of establishing the bank account in the name of his wife and maintaining on his books of account the elaborate records he did maintain, purporting to show debits and credits as between himself and his wife.' ”

* * *

“We repeat that the charge against appellant is not failure to keep books, but instead is failure to keep books from which financial condition may be ascertained. It seems clear to us that evidence of any device by which true financial condition is concealed may be used to support the charge as made. Cf. *In re Biro*, 2 Cir., 107 F. 2d 386.”

In the original memorandum of authorities filed in this case by Mr. Garbus, the bankrupt's attorney, it was contended that this case was not applicable to the case at bar. At page 2 of this memorandum it was argued:

“(a) In that case the order of the Referee was affirmed although the order was one denying discharge.”

This, of course, does not distinguish the case.

“(b) In that case the bankrupt maintained a bank [181] account in his wife's name without disclosing to the bank, nor did the bank records show, that he was the owner of said bank account. In our case the bankrupt did disclose to the bank and the bank's records did show that he had an interest in the F. J. Ward bank account, and that the bankrupt could withdraw moneys from said account upon his check and signature.”

There is nothing in the case at bar to indicate from the bank's records that the bankrupt had any interest in the Ward bank account. The signature card merely indicated that he had a right to sign checks upon the account as Ward's agent. In this respect the facts are identical with that of the Manasse case. The court in the Manasse case stated the facts to be:

"Appellant had a power of attorney in this account and used it in all ways as his own, signing checks and depositing and withdrawing funds, his own and those of his clients. The same system was employed with respect to other bank accounts opened from time to time with funds of the wife to take the place of accounts closed for various reasons. For a period of about three years, to January 1938, appellant and his wife maintained a joint checking account, but with the exception of this, appellant's name never appeared on any of the accounts although he used each account in his wife's name very extensively in carrying on his profession."

Mr. Garbus further contended in his memorandum:

"(c) In that case the bankrupt failed to disclose the existence of a bank account in his schedule of assets, whereas in our case the bankrupt did disclose the existence of said account in his schedule."

The disclosure was not made in the schedule. It was made in the "Statement of Affairs" required under the Supreme Court rules. [182]

In the form prescribed by the Supreme Court the bankrupt was required to answer the following interrogatory:

"4a. What bank accounts have you maintained, alone or together with any other person, and in your

own or any other name, within the two years immediately preceding the filing of the original petition herein?"

The disclosure of the Ward bank account was made in response to this question. The bankrupt had no alternative unless he committed perjury.

The basis of the objections to the discharge was not that the bankrupt did not make the disclosure "after" he filed his petition but that he failed to do so within twelve months immediately preceding the filing of the petition. When this disclosure was made by the bankrupt after he had filed his petition, he had within twelve months immediately preceding the filing of the petition dissipated approximately \$30,000.

Mr. Garbus also contended:

"(d) In the case the court commented upon the fact that the bankrupt was a lawyer and certainly knew, in opening an account in his wife's name, that he intended to defraud, delay and hinder his creditors."

In the case at bar the bankrupt admitted his intent. He testified that his purpose was to avoid having creditors attach his money.

Mr. Garbus also contended:

"(e) In that case the court found that the bankrupt opened the account in his wife's name with intent to conceal his money from his creditors, whereas in our case the Referee found to the contrary."

We concede that the Referee found to the contrary in this case, but we insist that the Referee's finding is with-

out any basis and is against the uncontradicted admissions of the bankrupt as detailed in our petition for review and in our objections to the Master's [183] certificate thereunder.

Under point II of additional points and authorities, p. 8 of the answering points and authorities originally filed by Mr. Garbus, the case of *Bailey v. Ross*, 53 Fed. 2d 783, is relied upon in support of his contention that "the bankrupt intended no more than to rehabilitate himself financially at a time when he was endeavoring to make settlements with his creditors." The facts in the *Bailey v. Ross* case are essentially different from those in the case at bar. The facts in *Bailey v. Ross*, as shown by the opinion of the court at p. 784, are as follows:

"The bankrupt was an honest straightforward young farmer who made a persistent but unsuccessful effort to get out of debt. He owned personal property of the value of about \$2,500. All of it was mortgaged to his local bank to secure an indebtedness of about \$2,200. The bank was about to foreclose; the bankrupt wanted the bank to carry him through another crop, and to advance him some more money. Other creditors were pressing him, and the bank was unwilling to carry him further unless he would make a bill of sale to his wife. This the bankrupt did; but he did so, not with any intent to defraud creditors, but to secure further advancements from the bank and to prevent an immediate foreclosure. The bank then took a mortgage from the wife. Several months thereafter another creditor, ignoring the transfer, levied an execution on the mortgaged property. The bank advanced another \$1,000

on this slender security and paid off the execution creditor. The validity of the bank's mortgage has not been challenged."

The objecting creditor contended that the effect of the transfer was to hinder and delay creditors. [184]

Here is how Howard C. Strotz, the bankrupt, tried to rehabilitate himself.

In a period of less than two years (Dec. 13, 1938 to Aug. 30, 1940) he deposited and withdrew in the Ward bank account (Exhibit 2)	\$26,260.16
He withdrew from the estate of his wife (Vol. I, p. 36)	18,000.00
Total	<hr/> \$44,260.16

Paid to creditors:

Guy M. Peters (his Chicago lawyer)	\$500.00	
Bekins Van and Storage Company	600.00	
Hamilton Vose, Jr.	500.00	1,600.00

Unaccounted for	\$42,660.16
(Except that \$2,000 was spent for a pleasure trip to Honolulu)	

The Referee did not find that the bankrupt was trying to rehabilitate himself. Referee Utley did, however, express himself upon this subject during the hearing. We have incorporated these statements in our petition for review pages 31 to 32, and they appear at pages 11 and 12 of the abstract of transcript submitted herewith. These

statements show that the Referee did not share this view of bankrupt's counsel at the time of the hearings before him.

(Vol. II, p. 169-172) "The Referee: Well, Mr. Strotz testified here, and he has been very frank about it, in substance that he put this money where it could not be attached. Mr. Garbus: Which money is that? The Referee: Put it in Mr. Ward's bank account. Mr. Garbus: There wasn't any money then—just a few hundred dollars. The Referee: Any other construction of his testimony in that regard would certainly be a very, very strange construction." [185]

"Mr. Garbus: Yes, but this reflects upon the bankrupt, and you know very well if it is to be brought in on the charge of fraud on the part of the bankrupt I will resist it to the last, and every attorney should. Your Honor, Mr. Strotz testified he opened this bank account solely for the purpose of giving him the opportunity not to be harassed by attachments. That is true. He made the general statement but he had in his mind his ex-wife, but that is not a wrong as far as his creditors— The Referee: Let us see whether or not it is. If he did put this money in the bank so he could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carries the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it. Mr. Garbus: Your Honor, would your Honor say then that the law is a man who is in debt must wear his heart on his sleeve, as far as his creditors are concerned? That

is not the law. The law is a man in debt has a right to prefer one creditor over another, he has the right to invest his money in a speculation, he has a right to buy things he needs, an automobile and clothing— The Referee: If there has been any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got money, so there is no preferring one creditor over another. They have been all very much in the same class, they have not gotten anything, as far as the testimony is concerned.” [186]

Plan of Arrangement Offered by Bankrupt

The bankrupt did not make an offer to his creditors until after objections to his discharge were filed. He was not in any business, so that this is not a case of a bankrupt trying to reorganize a going business. He first offered \$10,000; that was rejected. He then offered \$25,000 which was rejected. The present offer made nineteen months after the filing of the voluntary petition for adjudication was \$32,000. This is a clear case of a bankrupt trying to bargain with his creditors and the Court for the purpose of buying his discharge. Before a plan of arrangement can be approved under the Bankruptcy Act it must appear:

1. That it be accepted in writing by a majority in number and amount of creditors.
2. That it is for the best interest of creditors.
3. That it is fair, equitable and feasible.
4. That the debtor has not been guilty of any acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt.
5. That the proposal be in good faith.

It is our contention that none of these objections have been met.

Whether the plan had been accepted in writing by a majority in number and amount of creditors depends upon the ruling of this Court upon our objections to Referee Laugharn's supplemental report on the Vollintine claim. Upon the question of whether the plan is for the best interest of creditors it is difficult to perceive how the creditors are better benefited by the acceptance of a small dividend out of the gross sum of \$32,000, from which the cost of administration must first be paid, rather than take their chances upon the bankrupt surviving his mother, in which event he will receive outright a third of a million dollars, which, in the event of the Court's denying his discharge, would be subject to the claims of creditors. The record in this case [187] discloses that the plan is neither fair nor equitable. The record likewise discloses that the bankrupt, by his own admissions, has committed acts which would bar his discharge. The proposal is not in good faith, as demonstrated by the fact that the first offer was not made until thirty days after the RFC had filed objections to his discharge, and the last offer was not made until more than nineteen months after the filing of the original voluntary petition for adjudication.

The RFC is the largest creditor of this bankrupt estate. It has more at stake than any other creditor. It is our contention that its claim exceeds in amount the aggregate of all other provable claims and it has a greater interest than any other creditor upon the question of whether this plan should be confirmed. It is apparent that the sole reason that the Referee granted the dis-

charge and approved the plan was the fact that the other creditors have accepted the plan. (One of the other creditors has since withdrawn his consent to the plan.)

Referee Utley had no right to disregard the fact that the bankrupt had admitted an act which would bar his discharge in bankruptcy or to say that because the bankrupt has now offered an amount that is equal to that which he concealed from his creditors that he will disregard the provisions of Section 14c of the Bankruptcy Act, the decision of the Circuit Court of Appeals of this circuit in the case of *Averill vs. Quittner*, 131 Fed. (2d) 312, and arbitrarily confirm the plan of arrangement offered by the bankrupt. Such action is repugnant to the purposes of the Bankruptcy Act, which is to afford relief to honest debtors who have not committed any of the acts which would bar their discharge.

Under the uncontradicted evidence, the order of Referee Utley entered December 2, 1942, granting the bankrupt his discharge [188] and confirming the amended plan of arrangement of the bankrupt should be set aside.

Respectfully submitted,

FRANK MICHELS and
JACOB J. LIEBERMAN,
Attorneys for Reconstruction Finance
Corporation.

Frank Michels
Of Counsel.

[Endorsed]: Filed Mar. 27, 1944, [189]

[Title of District Court and Cause.]

PORTIONS OF TRANSCRIPT SUPPORTING OB-
JECTIONS OF RECONSTRUCTION FINANCE
CORPORATION TO BANKRUPT'S DIS-
CHARGE AND PLAN.

Objection I

Failure to Keep Books and Destruction of Records
Testimony of Harold C. Strotz, Bankrupt:

Vol. I, p. 71 and 72. I have no books and records.
Before I left Chicago, I destroyed all my check books.

Vol. I, p. 112. I do not have the cancelled checks on
the bank account at the Security-First National Bank
which I carried in the name of F. J. Ward. Every month
I destroyed them. I never kept any books. I never had
the checks after the month.

Vol. I, p. 116. "I have no cancelled checks. I destroy
them each month. I have no records."

Objection II A. B.

Concealment of Assets by Virtue of Maintaining Bank
Account in Name of F. J. Ward

Testimony of Harold C. Strotz, Bankrupt:

Vol. I, p. 30. I had a bank account in the Security-
First National Bank of Los Angeles, Hollywood and

Cahuenga Branch. The account was in the name of F. J. Ward and checks were signed by myself for Mr. Ward. [190]

Vol. I, p. 39. This account was closed in August or September of 1940.

Vol. I, p. 94. "The reason for that was that I was continually harassed by sheriff's orders or something like that, and I was just afraid to try and do anything."

Vol. I, p. 98. "Yes, when did they start harassing you so you could not do business?" A. I consider they have been doing it ever since 1930."

Vol. I, p. 107-108. "Q. You had an account in the name of F. J. Ward? A. That is right. Q. At the Security-First National Bank in Hollywood? A. Hollywood and Cahuenga. Q. What did you use that account for, the account in the name of F. J. Ward? A. I used it as a banking account. Q. To pay your personal expenses and things of that kind? A. Yes. Q. To pay your department store accounts? A. Yes. Q. When did you open the account in the name of F. J. Ward? A. The bank has the record— Q. I want your recollection? A. I think I opened it in the fall of 1938. The Referee: What was the purpose of carrying the account in the name of F. J. Ward? A. Because I was having a lot of trouble at the time with my former wife

and I had had my bank account attached prior to that, so I carried it in his name.”

Testimony of F. J. Ward:

Vol. I, p. 181. “Q. And you knew that he had told you the reason he wanted that account opened in your name was that he could not keep any money in his own name without it being attached by creditors? A. Well, he said that he thought that there were,—there was a possibility of certain moneys of his being attached and he asked me if I would object to having that account and I said no. I put in the account myself, I established the account. He did not.”

Testimony of Harold C. Strotz, Bankrupt:

Vol. II, p. 17. On or about December, 1939, I had an average [191] balance in my bank account in the name of F. J. Ward, in excess of \$1,000.00. The account of the bankrupt in the name of F. J. Ward, commencing December 13, 1938, up to the date of the closing of the account on August 30, 1940, consisting of four ledger sheets and two signature cards was offered in evidence as trustee's Exhibit No. 2.

[TRUSTEE'S EXHIBIT No. 2]

WARD, F. J.

Harold Strotz has P/A

No. commercial

Dec. 7, 1938

TO SIGN AND ENDORSE—LIMITED

Security-First National Bank of Los Angeles:

I/we hereby authorize Harold Strotz, whose signature appears below, for and on my/our behalf and in my/our name(s) to execute checks and other items for funds now on deposit or which may hereafter be deposited in my/our Commercial Account No. with your Bank, and to endorse checks and other items payable to me (us or either of us) for deposit in said account and hereby ratifies all his/her acts in my/our behalf with you in connection with said account.

F. J. Ward

By Harold Strotz

Signature as Agent Will Sign

F. J. Ward

Signature of Principal

FJW

Signature of Principal

WHEN ACCOUNT IS IN TWO OR MORE INDIVIDUAL NAMES,
ALL MUST SIGN

WARD, F. J.

No Commercial

I hereby agree to the conditions printed in the Bank Book issued in connection with this Account by the Security-First National Bank of Los Angeles.

Sign

Here F. J. Ward

9243 Doheney Rd L A

Mr.
Mrs.
Miss

SIGNATURE VERIFIED

Residence

Address ~~Carmel, Cal. Box 953~~ Tel. Carmel 25

City

Business

Address 1118 Tower Rd Beverly Hills Tel.

City

Other A/Cs This Branch

Occupation

Former Bank Account

or Reference Bank of Carmel—Carmel Calif.

Birth

Introduced By Harold Strotz

Place

St. Paul, Minn.

Mother's Maiden Name

First Deposit

Acct. Opened By

Date

\$480.00 Cash EC

SIGNATURE CARD—INDIVIDUAL

Closing Date 8/30/40

Reason Going Away

A.B. 100—

A.M. 300— [67]

(Trustee's Exhibit No. 2)

HOLLYWOOD & CAHUENGA

NA
Sheet No.

(1)


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F. J. WARD

HAROLD STROTZ HAS P.A.

Old Balance	Checks	Checks	Checks	Deposits	1938	New Balance
Balance Brought Forward 						
				480.00	Dec 13	480.00 *
480.00				1,000.00	Dec 15	1,480.00 *
1,480.00	100.00—				Dec 16	1,380.00 *
1,380.00	40.00—				Dec 20	1,340.00 *
1,340.00	30.22—	300.00—			Dec 22	1,009.78 *
1,009.78	10.00—				Dec 27	999.78 *
Jan 1939						
999.78	100.00—				Jan 4	899.78 *
899.78	200.00—				Jan 9	699.78 *
699.78	5.92—	3.51—	41.62—			
	12.73—	27.83—			Jan 14	608.17 *
608.17		50.00—			Feb 23	558.17 *
558.17	55.37—	66.02—			Feb 27	436.78 *
436.78	100.00—				Feb 28	336.78 *
336.78	50.00—	50.00—	50.00—		Mar 1	186.78 *
186.78	75.00—				Mar 1	111.78 *
111.78	40.00—			√689.34	Mar 11	761.12 *
761.12	40.00—				Mar 14	721.12 *
721.12	5.22—	17.48—	27.09—			
	35.73—				Mar 15	635.60 *
635.60	18.25 Lst				Mar 15	617.35 *
617.35	25.00—	25.00—		146.69	Mar 23	714.04 *
714.04	16.88—	4.29—			Mar 28	692.87 *
692.87	6.02—				Mar 29	686.85 *
686.85	25.00—				Apr 1	661.85 *
661.85	20.00—			√600.00	Apr 1	1,241.85 *
1,241.85	500.00—				Apr 3	741.85 *
741.85				35.79	Apr 3	
				18.25	Apr 3	795.89 *
795.89	27.51—	100.00—			Apr 4	668.38 *
668.38	18.25 Lst			50.00	Apr 4	700.13 *
700.13	10.30—				Apr 6	689.83 *
689.83	40.00—				Apr 7	649.83 *

Balance Forward

[68]

(Trustee's Exhibit No. 2)

HOLLYWOOD & CAHUENGA

(2)

Sheet No.


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

HAROLD STROTZ HAS P/A

Old Balance	Checks	Checks	Checks	Deposits	1939	New Balance
Balance Brought Forward 						
649.83	6.00—				Apr 10	643.83 *
643.83	25.00—			258.26	Apr 12	877.09 *
877.09	18.00—	23.00—			Apr 15	836.09 *
836.09	157.50—	22.00—	15.00—		Apr 17 '39	641.59 *
641.59	25.00—				Apr 17 '39	616.59 *
616.59	500.00—	43.30			Apr 19 '39	73.29 *
73.29	19.00—				Apr 21 '39	54.29 *
54.29	20.00—			92.66	Apr 21 '39	126.95 *
126.95	20.00—				Apr 24 '39	106.95 *
106.95				98.68	Apr 24 '39	205.63 *
205.63	50.00—			89.07	Apr 27 '39	244.70 *
244.70	70.00—				Apr 28 '39	174.70 *
174.70	12.92 Lst				Apr 28 '39	161.78 *
161.78	17.39—				Apr 29 '39	144.39 *
144.39				12.92	May 2 '39	157.31 *
157.31	49.95—				May 3 '39	107.36 *
107.36	10.00—				May 5 '39	97.36 *
97.36	29.00—				May 8 '39	68.36 *
68.36	10.00—			50.00	May 8 '39	108.36 *
108.36				47.10	May 9 '39	155.46 *
155.46	10.48—	5.50—	3.25—		May 12 '39	136.23 *
136.23	56.98—				May 13 '39	79.25 *
79.25	35.00—			50.00	May 13 '39	94.25 *
94.25	18.00—				May 15 '39	76.25 *
76.25				145.74	May 24 '39	221.99 *
221.99				200.00	May 25 '39	421.99 *
421.99	26.00—				May 26 '39	395.99 *
395.99	41.19—				May 29 '39	354.80 *
354.80				35.00	May 29 '39	389.80 *
389.80	50.00—				May 31 '39	339.80 *
339.80	4.03—	10.28—	53.02—			
	6.34—					
266.13	55.85—				Jun 1 '39	266.13 *
210.28				250.00	Jun 2 '39	210.28 *
210.28					Jun 2 '39	460.28 *
460.28	250.00—				Jun '39	210.28 *
210.28	.52 Lst					209.76 *
209.76				76.57	Jun 8 '39	286.33 *
Balance Forward						[69]

(Trustee's Exhibit No. 2)

HOLLYWOOD & CAHUENGA

Sheet No.

(3)


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits		New Balance
Balance Brought Forward 						
286.33✓				200.00	Jun 10 '39	486.33 *
486.33	140.00—				Jun 12 '39	346.33 *
346.33	13.00—	40.00—			Jun 13 '39	293.33 *
293.33	20.00—				Jun 14 '39	273.33 *
273.33	30.00—				Jun 21 '39	243.33 *
243.33				300.00	Jun 29 '39	543.33 *
543.33	32.15—	30.50—			Jul 1 '39	480.68 *
480.68	30.00—				Jul 1 '39	450.68 *
450.68	35.00—				Jul 5 '39	415.68 *
415.68				✓659.70	Jul 5 '39	1,075.38 *
1,075.38	250.00—				Jul 6 '39	825.38 *
825.38	23.50—				Jul 7 '39	801.88 *
801.88	30.00—				Jul 10 '39	771.88 *
771.88	40.00—			355.00	Jul 10 '39	1,086.88 *
1,086.88	308.88—				Jul 13 '39	778.00 *
778.00	5.66—	97.08—	7.73—			
	4.55—				Jul 14 '39	662.98 *
662.98				✓500.00	Jul 17 '39	1,162.98 *
1,162.98	503.75—	20.00—		.52		
				✓1,500.00	Jul 18 '39	2,139.75 *
2,139.75	64.47—				Jul 19 '39	2,075.28 *
2,075.28	100.00—				Jul 24 '39	1,975.28 *
1,975.28	1,500.00—				Jul 26 '39	475.28 *
475.28	59.44—	25.00—	30.35—			
	75.95—				Jul 28 '39	284.54 *
284.54	4.94—	96.83—	4.38—			
	5.58—	40.00—			Jul 29 '39	132.81 *
132.81				174.40	Jul 31 '39	307.21 *
307.21	163.30—				Aug 7 '39	143.91 *
143.91	20.00—				Sep 23 '39	123.91 *
123.91	14.00—				Sep 27 '39	109.91 *
109.91	11.43—	35.76—	6.00—		Sep 29 '39	56.72 *
56.72	6.00—	15.00—			Oct 3 '39	35.72 *
35.72				105.15	Oct 4 '39	140.87 *
140.87	20.50—				Oct 5 '39	120.37 *

Balance Forward

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(Trustee's Exhibit No. 2)

(4)

HOLLYWOOD & CAHUENGA

Sheet No.


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits	New Balance
Balance Brought Forward 					
120.37	30.00—				90.37 *
90.37				√1,006.50	Oct 10 '39 1,096.87 *
1,096.87	.40 Lst				Oct 11 '39 1,096.47 *
1,096.47	150.00—				Oct 14 '39 946.47 *
946.47	62.35—	50.05—			Oct 16 '39 834.07 *
834.07	2.84—				Oct 17 '39 831.23 *
831.23	522.75—				Oct 17 '39 308.48 *
308.48				122.05	Oct 20 '39 430.53 *
430.53	100.00—	25.00—		113.29	Oct 28 '39 418.82 *
418.82	18.50—				Nov 13 '39 400.32 *
400.32	30.00—				Nov 14 '39 370.32 *
370.32	50.00—				Nov 16 '39 320.32 *
320.32				√323.90	Nov 16 '39 644.22 *
644.22	20.00—				Nov 20 '39 624.22 *
624.22	120.00—				Nov 24 '39 504.22 *
504.22	30.00—	28.60—			Nov 25 '39 445.62 *
445.62	100.00—				Nov 27 '39 345.62 *
345.62	22.00—				Nov 29 '39 323.62 *
323.62	47.97—	24.81—	39.14—		Nov 30 '39 211.70 *
211.70	113.10—	10.77—			Dec 1 '39 87.83 *
87.83	30.00—			187.17	Dec 8 '39 245.00 *
245.00				√400.00	Dec 12 '39 645.00 *
645.00	100.00—	40.00—			Dec 14 '39 505.00 *
505.00	200.00—				Dec 14 '39 305.00 *
305.00	66.55—				Dec 19 '39 238.45 *
238.45	50.00—				Dec 20 '39 188.45 *
188.45				√309.19	Dec 20 '39 497.64 *
497.64				40.00	Dec 22 '39 537.64 *
537.64	15.00—				Dec 22 '39 522.64 *
522.64	29.32—	11.00—			Dec 23 '39 482.32 *
482.32	29.48—				Dec 26 '39 452.84 *
452.84	90.00—			√700.00	Dec 26 '39 1,062.84 *
1,062.84	40.00—			√565.47	Dec 27 '39 1,588.31 *
1,588.31	35.28—				Dec 28 '39 1,553.03 *
1,553.03	191.11—				Dec 29 '39 1,361.92 *
1,361.92	52.50—				Dec 29 '39 1,309.42 *
1,309.42	26.16—	86.43—			Dec 30 '39 1,196.83 *

Balance Forward

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(Trustee's Exhibit No. 2)

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HOLLYWOOD & CAHUENGA

Sheet No.


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits		New Balance
Balance Brought Forward 						
1,196.83✓	40.00—				Jan 2 '40	1,156.83 *
1,156.83	16.28—	250.00—			Jan 3 '40	890.55 *
890.55				300.00	Jan 3 '40	1,190.55 *
1,190.55	25.00—				Jan 6 '40	1,165.55 *
1,165.55	20.00—			150.00	Jan 8 '40	1,295.55 *
1,295.55	100.00—				Jan 11 '40	1,195.55 *
1,195.55	1.00 Lst	300.00—		107.70	Jan 11 '40	1,002.25 *
1,002.25				✓900.00	Jan 12 '40	1,902.25 *
1,902.25	38.83—	17.00—			Jan 13 '40	1,846.42 *
1,846.42	46.84—	5.13—	7.18—			
	150.00—	100.00—			Jan 15 '40	1,537.27 *
1,537.27	400.00—				Jan 15 '40	1,137.27 *
1,137.27	65.16—	30.00—			Jan 16 '40	1,042.11 *
1,042.11	308.88—	11.25—			Jan 16 '40	721.98 *
721.98	3.90—	125.00—			Jan 17 '40	593.08 *
593.08	25.00—				Jan 18 '40	568.08 *
568.08	33.27—				Jan 19 '40	534.81 *
534.81				165.00	Jan 19 '40	699.81 *
699.81	29.00—				Jan 20 '40	670.81 *
670.81	201.50—				Jan 20 '40	469.31 *
469.31	125.00—				Jan 23 '40	344.31 *
344.31	50.00—				Feb 2	294.31 *
294.31	109.56—			89.99	Feb 14 '40	274.74 *
274.74	32.21—				Feb 20 '40	242.53 *
242.53				165.00	Feb 23 '40	407.53 *
407.53	25.00—				Feb 24 '40	382.53 *
382.53	25.00—				Feb 26 '40	357.53 *
357.53				300.00	Feb 29	657.53 *
657.53				✓3,000.00	Mar 2	3,657.53 *
3,657.53	166.52—					
	100.00—				Mar 4	3,391.01 *
3,391.01	15.00—				Mar 6 '40	3,376.01 *
3,376.01	60.00—				Mar 7 '40	3,316.01 *
3,316.01	2,000.00—				Mar 10 '40	1,316.01 *
1,316.01	164.00—				Mar 11 '40	1,152.01 *
1,152.01	1,000.00—				Mar 13 '40	152.01 *

Balance Forward

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(Trustee's Exhibit No. 2)

(6)

Sheet No.

HOLLYWOOD & CAHUENGA


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits		New Balance
Balance Brought Forward 						
152.01				100.00	Mar 21 '40	252.01 *
252.01	2.83—				Mar 23 '40	249.18 *
249.18	27.65—				Mar 28 '40	221.53 *
221.53	7.50—				Apr 2 '40	214.03 *
214.03	40.00—			134.62	Apr 12 '40	308.65 *
308.65	100.00—				Apr 15 '40	208.65 *
208.65				√2,320.00	Apr 15 '40	2,528.65 *
2,528.65	139.08—	22.00—			Apr 17 '40	2,367.57 *
2,367.57	50.00—				Apr 19 '40	2,317.57 *
2,317.57	750.00—				Apr 22 '40	1,567.57 *
1,567.57	25.00—			300.00	Apr 23 '40	1,842.57 *
1,842.57	150.00—	25.00—	26.90—		Apr 24 '40	1,640.67 *
1,640.67	45.99—	31.00—			Apr 25 '40	1,563.68 *
1,563.68				40.60	Apr 26 '40	1,604.28 *
1,604.28	50.00—				Apr 29	1,554.28 *
1,554.28	26.07—	60.00—	27.56—		Apr 30 '40	1,440.65 *
1,440.65	51.13—	32.50—			May 2 '40	1,357.02 *
1,357.02	5.82—	4.43—			May 3 '40	1,346.77 *
1,346.77	116.00—				May 4 '40	1,230.77 *
1,230.77	35.00—				May 8 '40	1,195.77 *
1,195.77	15.00—			182.78	May 8 '40	1,363.55 *
1,363.55	80.00—				May 10 '40	1,283.55 *
1,283.55	58.52—	9.38—			May 13 '40	1,215.65 *
1,215.65	23.91—	57.15—	39.68—		May 14 '40	1,094.91 *
1,094.91	20.00—			√500.00	May 14 '40	1,574.91 *
1,574.91	500.00—	40.83—			May 15 '40	1,034.08 *
1,034.08	21.50—				May 17 '40	1,012.58 *
1,012.58	10.00—	25.00—			May 21 '40	977.58 *
977.58	30.00—				May 21 '40	947.58 *
947.58	500.00—				May 23 '40	447.58 *
447.58	40.00—	27.00—	135.00—			
	90.00—				May 27 '40	155.58 *

Balance Forward

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(Trustee's Exhibit No. 2)

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HOLLYWOOD & CAHUENGA

Sheet No.


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits	New Balance
Balance Brought Forward 					
155.58✓	52.04—				Jun 1 '40 103.54 *
103.54	30.00—				Jun 7 '40 73.54 *
73.54	10.00—				Jun 11 63.54 *
63.54	25.00—				Jun 12 '40 38.54 *
38.54	6.91—				Jun 21 '40 31.63 *
31.63	7.99—				Jun 22 '40 23.64 *
23.64				400.00	
				150.00	Jun 24 '40 573.64 *
573.64	3.90—	48.50—			Jun 26 '40 521.24 *
521.24	17.06—				Jun 28 '40 504.18 *
504.18	(29.80)—				Jul 1 '40 474.38 *
474.38	29.87—			(29.80)	Jul 1 '40 474.31 *
474.31				523.00	Jul 2 '40 997.31 *
997.31	170.99—	42.00—	42.00—		Jul 5 '40 742.32 *
742.32	25.00—	30.00—	57.14—		Jul 8 '40 630.18 *
630.18	308.88—			500.00	Jul 8 '40 821.30 *
821.30	36.00—				Jul 9 '40 785.30 *
785.30	20.30—	42.00—			Jul 9 '40 723.00 *
723.00	135.00—	.64 Lst	41		Jul 11 '40 587.36 *
587.36	11.94—				Jun 12 '40 575.42 *
575.42	25.00—				Jun 13 '40 550.42 *
550.42	10.74—				Jul 15 '40 539.68 *
539.68	20.00—	15.00—	40.00—		Jul 16 '40 464.68 *
464.68	30.00—				Jul 16 '40 434.68 *
434.68	58.52—	3.48—			Jul 17 '40 372.68 *
372.68				150.00	Jul 17 '40 522.68 *
522.68	30.00—			100.00	Jul 18 '40 592.68 *
592.68	6.91—				Jul 19 '40 585.77 *
585.77	123.00—	50.00—		✓700.00	Jul 19 '40 1,110.77 *
1,110.77	29.95—	9.45—	373.00—		Jul 23 '40 698.37 *
698.37	13.00—	4.40—	34.40—		
	107.54	46.05—			Jul 24 '40 492.98 *
492.98	135.00—				Jul 25 '40 357.98 *
357.98	17.69—				Jul 27 '40 340.29 *
340.29				200.00	Jul 29 '40 540.29 *
540.29	.84 Lst				Aug 9 '40 539.45 *

Balance Forward

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(Trustee's Exhibit No. 2)

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HOLLYWOOD & CAHUENGA

Sheet No.


Ledger Sheet

Commercial Account

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

F J WARD

Harold Strotz has P/A

Old Balance	Checks	Checks	Checks	Deposits	New Balance
Balance Brought Forward 					
539.45	29.61—	2.65—	4.08—	Aug 15 '40	503.11 *
503.11	100.00—			Aug 17 '40	403.11 *
403.11	44.17—			Aug 19 '40	358.94 *
358.94	100.00—			Aug 20 '40	558.94 *
558.94	10.00—			Aug 21 '40	548.94 *
548.94	11.32—	14.07—		Aug 22 '40	523.55 *
523.55	46.98—			Aug 23 '40	476.57 *
476.57	25.00—			Aug 24 '40	451.57 *
451.57	1,464.06—	29.00—		Aug 24 '40	1,451.57 *
1,451.57	750.00—			Aug 26 '40	701.57 *
701.57	25.00—			Aug 28 '40	676.57 *
676.57	10.00—	34.00—		Aug 29 '40	632.57 *
632.57	250.00—			Aug 29 '40	382.57 *
382.57	150.00—			Aug 30 '40	232.57 *
232.57	132.57—			Aug 30 '40	100.00 *
100.00	100.00—			Aug 30 '40	.00 *

[Endorsed]: No. 37302-M. Harold C. Strotz, Bankrupt. Trustee vs. F. J. Ward. Trustee's Exhibit No. 2. Filed April 3, 1941. Ernest R. Utley, Referee, by L. R.

[Endorsed]: Filed Dec. 30, 1942. [75]

Vol. II, p. 23. On or about September 6, 1939, I was served with a summons and complaint in an action filed in the Superior Court of Los Angeles County, No. 444,462, entitled Martin T. O'Brien as receiver of the Reliance Bank and Trust Company, plaintiff, versus Harold C. Strotz, defendant.

Vol. II, p. 24. Mr. Garbus acted as my attorney in that matter.

Vol. II, p. 27-28. "Mr. Dechter: I intend to show this witness even while restrained by a Court order from transferring his assets made an affidavit that he did not have this particular bank account, and after the injunction was made transferred this F. J. Ward bank account to someone else by closing it out. In other words, we have showed the fact he opened the bank account in F. J. Ward's name for the purpose of putting it beyond the reach of certain creditors, and we intend to show that bank account concealment continued; that when he was served with the restraining order he filed an affidavit he had not such account and after the restraining order was served on him he went ahead and transferred the bank account that was in the name of F. J. Ward."

Vol. II, p. 33. Statement by Mr. Garbus the F. J. Ward bank account was closed on August 30, 1940, and this restraining order was issued September 23, 1940.

Vol. II, p. 39-40. "Mr. Dechter: I next wish to call the Court's attention from the file which has been received in evidence to the order to show cause why an injunction pendente lite restraining the defendant from conveying or encumbering property should not issue, and the temporary restraining order issued on August 21,

1940, by [192] the Honorable Judge Wilson of the Superior Court, which was returnable on August 30, 1940, and which provides that pending the hearing of said order to show cause— Mr. Garbus: It does not prove he cannot close the bank account. Mr. Dechter: —he is restrained from issuing, releasing, transferring, withdrawing, leasing or mortgaging, pledging or hypothecating or creating any lien of any kind whatsoever upon that certain interest owned by the said Harold C. Strotz in the estate of Anne Gould Strotz, deceased, and any and all moneys, credits, debts or other things of value owned by or in the possession or under the control of the Cahuenga and Hollywood Branch of the Security-First National Bank of said Harold C. Strotz.

“Also the affidavit to support said order to show cause of William J. Currer, Junior, which affidavit states that the affiant has been informed and that the bankrupt, the defendant in said action, has an account in the Cahuenga and Hollywood Branch of the Security-First National Bank.

“I also wish to call the Court’s attention to the affidavit of Harold C. Strotz filed in opposition to said order to show cause in the Superior Court action on September 6, 1940, acknowledged on September 3, 1940, and which states among other things:

“That he has no account in the Cahuenga and Hollywood Branch of the Security-First National Bank of Los Angeles and did not have such account at the time of the service upon him of the order to show cause, save that the estate of Anne Gould, deceased, has an account in said bank in which there is the sum of approximately \$500 as aforesaid.”

Statement by Mr. Dechter the bank account of the bankrupt in the name of F. J. Ward, trustee's Exhibit No. 2 shows that on August [193] 28, 1940, there was a balance in that account of \$676.57.

Objection II I. and J.

Concealment of \$11,500 Inherited From Estate of
Anne Gould Strotz, Deceased.

Testimony of Bankrupt:

Vol. I, p. 36. My wife committed suicide on September 13, 1938. I was executor of her estate and as such, from the latter part of 1939 until March, 1940, I received approximately \$18,000.00.

Vol. I, p. 140. I received the first of this money in 1939, and the last of it in February, 1940. With this money, I went to Honolulu and to New York and to Chicago, and I tried to make arrangements to settle my other accounts.

Vol. I, p. 141. Most of this money I kept in cash. I may have deposited one or two thousand dollars in the account I had in the name of F. J. Ward. When I say I kept it in cash I mean cashier's checks drawn on the Security-First National Bank, I received the money at different times. I used some of it for living expenses and some for trips.

Vol. I, p. 304-305. "Mr. Dechter: Q. Mr. Strotz, I will show you a letter written by your counsel, Simon and Garbus, to William J. Currer dated October 23, 1939 in re Martin T. O'Brien, and so forth, versus Harold C. Strotz.

"Dear Mr. Curren:

This is to confirm our understanding that the defendant in the above-entitled action need not answer the complaint on file herein or otherwise plead in said action until you give to this office notice requesting him so to do. We understand that in the meantime you will advise this office as to the attitude of your client in extending the prosecution of this [194] action to preparations for settlement of this matter.

Yours very truly,

SIMON AND GARBUS

By Morton Garbus"

Does that refresh your memory you withdrew this \$11,500 after this action was pending against you? Mr. Garbus: What is the date of that letter? A. October 23, 1939. Mr. Garbus: That is nearly six months, isn't it? Mr. Dechter: Will you read the question? (The reporter read the pending question.) A. Well, of course I withdrew it afterwards, if that is the date of the letter."

Vol. I, p. 308-309. Mr. Dechter: Q. Mr. Strotz, I will show you the ledger sheet of the Security-First National Bank, Hollywood and Cahuenga Branch, which shows that you made the following deposits to the account of the estate of *Ann G. Strotz*:

October 29, 1938, \$1,562;

November 28, 1938, \$447.77;

April 21, 1939, \$3,000.00;

June 13, 1939, \$15,000.00

The witness calls my attention to the fact I missed a dollar deposit on May 5, 1939.

June 29, 1939, \$5,000.00;

November 9, 1939, \$5.87;

December 14, 1939, \$300.00;

February 26, 1940, \$16,948.12;

or a total of approximately a sum in excess of \$40,000.00 between those dates.

“Mr. Garbus furnished me with a copy of the report and petition for final distribution which has filled in in pencil—withdraw that—which originally had as prepared, on the blank day of blank, 1938,

—“Your petitioner caused to be made and returned to this [195] court a true inventory and appraisement of all the estate of said deceased which had come in his possession or knowledge as of that date was assets in a total sum of \$48,713.20,” and then filled in it is the 12th day of March, 1938, which is stricken and 1940 written in.

“Now, can you tell me why between the 25th of October, 1938 and the 12th day of March, 1940 no inventory and appraisement had been filed by you although you had received and cashed before that time a sum in excess of \$40,000.00? A. Well, yes, I can tell you one of the reasons for it.”

Vol I, p. 310-311. “A. Well, you see originally—it is a rather peculiar situation. Originally my wife’s estate was to receive a very much smaller sum, but I had studied the trust very carefully and I discussed with Mr. Jay Gould’s fiscal guardian for New Jersey, or financial

guardian, the point that this trust fund had unquestionably bought mortgages that were not legal for a trust, which was based,—this trust was formed in 1922, and it was based on the fact that only securities legal under the New York trust laws could be purchased. The result was that I never knew until early sometime in 1940 just exactly how much money my wife's estate would receive because the Commercial Trust Company of New Jersey finally made a settlement in which they took back a great number of these mortgages. They agreed to pay a certain percentage of interest for the years that no interest had been paid, and the result was that my stepson, his sister's estate received a large increase in principal over what they expected, a large increase in income, and because of the fact my wife had an interest, a life interest her estate received additional money: Mr. Dechter: Q. All right. Now, on June 13, 1939 the bank account shows that you had received up to that time a sum in excess of \$20,000.00. Are you able to explain why no inventory and appraisal was filed showing that amount until March of 1940? A. I never knew I was supposed to [196] file one."

Vol. I, p. 313. "Q. On March 2, 1940 I asked you about a deposit to your bank account in the name of F. J. Ward of \$3,000.00. You said that came from the estate of your wife. Is that correct? A. Yes, but it does not come from a check from the estate. It was money I had withdrawn prior to that."

Vol. II, p. 45-46. I issued a check on the Hollywood and Cahuenga Branch of the Security-First National Bank of Los Angeles to the estate of Anne Gould Strotz by Harold C. Strotz, executor, for \$11,500.00, payable

to the order of myself. I took this check and received in return for the same cashier's checks aggregating the sum of \$11,500.00.

Vol. II, p. 49. I took this money out to pay certain bills, and I drew it out because I will admit I was afraid my bank account might be attached in some form or other.

Vol. II, p. 50. At the time I drew this money from the estate account, I kept it in cashier's checks. I had this checking account in the name of F. J. Ward.

Vol. II, p. 51. I have been insolvent since December, 1929.

Vol. II, p. 95. Witness shown check dated October 20, 1939, drawn on the estate of Anne G. Strotz account for \$1,000.00 and testified (p. 96) that it was drawn without a court order. The check was made payable to Harold Strotz.

Vol. II, p. 97. I don't know what I did with that particular money.

Vol. II, p. 98. Bankrupt shown check of estate dated July 1, 1939, payable to bankrupt in the sum of \$4,000.00.

Vol. II, p. 99. I did not have a court order from the probate court of Los Angeles County authorizing that withdrawal. I believe I took \$2,000.00 of this money with me to Honolulu. I have no record of what I did with it. This withdrawal of \$4,000.00 on July 1, 1939, was made after I deposited \$5,000.00 in the account of the estate of Anne Gould. [197]

Vol. II, p. 102. I was the residuary beneficiary of the estate and withdrew funds from the estate account from

time to time and used those funds for my personal benefit.

Vol. II, p. 103. The estate of Anne Gould was opened in October, 1938, and no inventory was filed until March 12, 1940.

Vol. II, p. 113-114-115-116. Bankrupt shown check (trustee's Exhibit No. 6) for \$11,500.00 drawn on the estate account of Anne G. Strotz payable to bankrupt and bankrupt testified that in exchange for this check he received the following cashier's checks, dated February 26, 1940: Check No. 777,205 for \$3,600.00 payable to Harold C. Strotz. Check No. 777,207 for \$1,500.00 payable to Harold C. Strotz. Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt, for \$3,000.00. Check No. 777,201, payable to Bekins Van & Storage Company for \$600.00. Check No. 777,202 payable to Guy M. Peters for \$500.00. Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00. These checks total \$9,700.00. I don't remember whether I received the balance of the \$11,500.00 in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940.

Vol. II, p. 116. With reference to the check made out to my brother, Sidney M. Strotz, for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for \$3,000.00 drawn on the First National Bank of Chicago.

Vol. II, p. 117. When the personal check for \$3,000.00 was received back from my brother, I deposited it in the bank account I had in the name of F. J. Ward. When I received this personal check of my brother's for \$3,000.00 he said he would not accept it as I needed it more than he did. I sailed for Honolulu July 27, 1939, and returned September 13, 1939. [198]

Evidence re Interest in Trust Estate Created by
Father's Will

Testimony of Bankrupt:

Vol. I, p. 17. My understanding of my father's will is that at the time of my mother's death, I then have an interest in one-half of one-third of the estate, and five years later I have an interest in another one-half of one-third. The First National Bank of Chicago is the trustee under the trust created by this will. Under its terms my mother receives the income from the corpus of the estate during her lifetime. The other beneficiaries under the trust are my brother and my sister. At the time of my father's death, the value of his estate was in excess of \$1,000,000.00.

Vol. I, p. 18. It is still in the neighborhood of \$1,000,000.00. My mother lives here in Los Angeles part of the time. Her sole income is the income from this trust estate. Her annual income from this trust estate is over \$30,000.00. I don't know the exact amount.

Statements of Referee Utley

Vol. II, p. 156. "The Referee: I will tell you frankly the testimony thus far that impresses me in this matter, and the only testimony that impresses me is the fact these men were very close friends, lived together in the one house, that Mr. Ward did permit Mr. Strotz to use his name to carry a bank account in, and that it was being done for the purpose of keeping funds away from Mr. Strotz's creditors, backed by the further fact that Mr. Ward knew Mr. Strotz was in financial difficulty and the fact they carried on these transactions, together with the close relationship shown by the transactions in the

oil venture—referring to the two covered by Respondent's Exhibits A and B, and shown by some of the contracts relating to the same transaction."

Vol. II, p. 164. "The Referee: The testimony shows here that Mr. Strotz wanted to do something to prevent creditors from reaching his money, and Mr. Ward in 1938 was perfectly willing to go along [199] with him and cooperate with him in that manner, and the Court can take that into consideration in determining whether or not he was willing to assist Mr. Strotz in protecting himself in some other matters. While you can argue the matter, I am afraid you cannot make any impression on the Court on that point."

Vol. II, p. 165. "The Referee: That may be the testimony but the view of the Court from the testimony I have heard is I am impressed with this, that Mr. Strotz was not worried about his wife attaching him one-half as much as he was about someone else attaching. Mr. Garbus: There wasn't another single solitary creditor mentioned at the time, or evidence that another creditor existed at that time. The Referee: The Court cannot accept that viewpoint."

Vol. II, p. 166. "The Referee: If Mr. Strotz had had the protection of his creditors in mind he would have had some of that \$11,500.00 he got from his wife's estate to have gone toward the payment of some of them."

Vol. II, p. 169-172. "The Referee: Well, Mr. Strotz testified here, and he has been very frank about it, in substance that he put this money where it could not be attached. Mr. Garbus: Which money is that? The Referee: Put it in Mr. Ward's bank account. Mr. Garbus: There wasn't any money then—just a few hundred

dollars. The Referee: Any other construction of his testimony in that regard would certainly be a very, very strange construction."

"Mr. Garbus: Yes, but this reflects upon the bankrupt, and you know very well if it is to be brought in on the charge of fraud on the part of the bankrupt I will resist it to the last, and every attorney should. Your Honor, Mr. Strotz testified he opened this bank account solely for the purpose of giving him the opportunity not to be harassed by attachments. That is true. He made the general statement but he had in his mind his ex-wife, but that is not a wrong as far as his creditors— The Referee: Let us see whether or not it is. If he did put this money in the bank so he [200] could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carries the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it. Mr. Garbus: Your Honor, would your Honor say then that the law is a man who is in debt must wear his heart on his sleeve, as far as his creditors are concerned? That is not the law. The law is a man in debt has a right to prefer one* creditor over another, he has the right to invest his money in a speculation, he has a right to buy things he needs, an automobile and clothing— The Referee: If there has been any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got money, so there is no preferring one creditor over another. They have been all very much in the same class, they have not gotten anything, as far as the testimony is concerned."

Vol. II, p. 171-172. "Mr. Garbus: The next point I want to make is with reference to the claims this witness testified that he knew about. There were two actions filed in California which preceded this bankruptcy proceeding, and those actions were filed after the transactions here mentioned, as far as I remember them.

"This is what happened: The fact is this man was eventually going to be sued in California where his local property could be reached by attachment.

"Now, with reference to the need of money your Honor permits evidence of his withdrawals from an estate to prove at the time he entered into this transaction for \$500.00 he probably didn't need it. He withdrew the money from the estate, your Honor, long after this transaction, so how could that possibly be material? He withdrew the money from the estate in 1940 and these transactions took place in 1939. Why is that admissible? Do you assume a man does not need money merely because he has ten thousand dollars? That is no proof he does not need more when he owes two million. [201] The Referee: That argument is silly, when he owes two million and when the evidence itself discloses he did not pay one cent to creditors."

Exhibits

Trustee's Exhibit 2 is a statement of the bank account of the bankrupt in the name of F. J. Ward at the Security-First National Bank of Los Angeles. This shows the various deposits and withdrawals made by Strotz in this bank account for a period of two years before the bankruptcy. This exhibit has been transmitted by Referee Utley to this Court. [202]

Letter to Referee to Counsel for Reconstruction Finance
Corporation Filed by Leave of Court February 8, 1943

“United States District Court
Southern District of California
Central Division
Ernest R. Utley
Referee in Bankruptcy
327 Federal Building
Temple & Spring Streets
Los Angeles, Calif.
December 2, 1942

Frank Michels, Esq.
Bullinger, Michels & Dicus
134 S. La Salle Street
Chicago

Re: Harold C. Strotz, bankrupt

Dear Mr. Michels:

I am in receipt of your letter of November 30th, enclosing a copy of the decision of the Ninth Circuit in the case of *Averill v. Quittner*, for which I thank you.

This is to advise you that I signed the Findings of Fact, Conclusions of Law and Order this morning, confirming the plan of arrangement in the above entitled case.

From a strictly technical point of view, upon the cold question of whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered, I think your contention would be correct. However, I cannot bring myself to the point, under the facts in this case, of saying that the bankrupt is not entitled to a discharge when it would mean, in effect, that I would

literally pitch into the fire \$32,000.00, which all creditors except the Reconstruction Finance Corporation, have expressed a desire to have and [203] which they would not get if his discharge were denied. I feel that such an order would be of greater punishment to the creditors than to the bankrupt and would be a far greater detriment to them. Possibly this position forces me to require stricter proof upon the question of discharge in so far as the objector is concerned, than I would otherwise require but if creditors are to be denied the right to the funds in question, under the circumstances of the case, I much prefer that a higher court makes such an order. In arriving at this conclusion, I am not overlooking the fact that some day the bankrupt may come into possession of some funds through his father's estate but in this connection, I must remember that he gave an assignment of this interest to a creditor years ago and any other creditor in the estate, to participate in such funds, would certainly have an uphill fight through long drawn out and expensive litigation to ever acquire an interest therein.

Yours very truly,

Ernest R. Utley

Referee in Bankruptcy"

Respectfully submitted,

FRANK MICHELS and

JACOB J. LIEBERMAN,

Attorneys for Reconstruction Finance
Corporation. [204]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 27, 1944. [205]

[TITLE OF COURT AND CAUSE.]

REPLY BRIEF OF BANKRUPT IN SUPPORT OF
HIS DISCHARGE AND PLAN OF ARRANGE-
MENT

There remains pending in this proceeding the question as to whether the bankrupt is entitled to his discharge upon the confirmation of a plan submitted by him under Section 321 of Chapter XI of the Bankruptcy Act.

The only creditor objecting to the bankrupt's discharge and the confirmation of his plan of arrangement is the Reconstruction Finance Corporation who bases its objections upon two alleged grounds:

I. That the bankrupt failed to keep books of accounts or records from which his financial condition and business transactions might be ascertained, and

II. That the bankrupt concealed or permitted to be concealed his property with intent to hinder, delay or defraud his creditors.

This brief is supported by excerpts from the transcript of the testimony of the bankrupt and other witnesses in the bankruptcy proceedings and will therefore be confined to these two objections. [206]

I.

Keeping of Books and Records

The Referee made a finding that "the bankrupt for many years prior to the filing of his petition in bankruptcy was not engaged in any particular line of business and that the transactions carried on by him were not such as would require the keeping of a set of books or

records." This finding of the Referee is supported by the evidence as follows:

When the bankrupt was actually engaged in business in connection with which his heavy indebtedness in the sum of over \$1,000,000.00 was incurred, books and records were kept by the companies which carried on the business of the bankrupt. Those companies were

- (a) Keech & Company, a brokerage firm in Chicago, Illinois, and
- (b) The Chicago Stadium, Chicago, Illinois.

The testimony is uncontradicted in this connection that these companies kept books and records.

Transcript Vol. 1, page 99, line 25 and following.

It will be remembered that all of the debts incurred by the bankrupt, including the debt owing to the Reconstruction Finance Corporation, the objecting creditor, arose during and as a result of the stock market crash of 1929 and 1930 and the accompanying bank failures at that time. Subsequent to the 1929 and 1930 depression years the bankrupt was not engaged in any substantial business by reason of his heavy indebtedness and therefore there was no occasion for him to keep books of account or records. Such transactions as were carried on by the bankrupt were reflected by his bank accounts, records of which were available and were introduced in evidence in this bankruptcy proceeding.

The Referee further found that the bankrupt did not mutilate, falsify or conceal any of his books of account or records.

Findings of Fact No. 9. [207]

The evidence showed that the bankrupt filed income tax returns during each year that he had received income and that the income taxes were paid by the bankrupt pursuant to the income tax returns.

Transcript Vol. 1, page 99, line 16 and following.

The bankrupt testified that up to the date of the hearing in the bankruptcy proceedings he had in his possession the cancelled checks of a small oil company in which he was interested.

Transcript Vol. 1, page 144, line 20.

Furthermore, the Referee expressly found that whereas it is true that certain of the cancelled checks of the bankrupt were not retained by him and were destroyed in the usual course of events, such act on the bankrupt's part was without any intent to hinder, delay or defraud creditors.

Findings of Fact No. 10.

II.

There Was No Concealment by the Bankrupt of His Property.

A. The F. J. Ward Bank Account.

The finding made by the Referee in this matter to the effect that the bankrupt did not conceal any of his property for the purpose of hindering, delaying or defrauding his creditors is substantially supported by the evidence even though there may be a conflict in that regard.

Findings of Fact No. 11.

The objecting creditor makes an issue of the fact that the bankrupt caused to be opened and maintained a bank

account in the name of F. J. Ward at the Security First National Bank of Los Angeles, and that this was done by the bankrupt with the intent to hinder, delay or defraud his creditors. The Referee, having all of the facts in the case before him in this connection, made a finding that there was but a small sum of money on deposit in this account within twelve months prior to the commencement of the bankruptcy proceeding and that this bank account was not maintained by the bankrupt for the [208] purpose of hindering, or delaying or defrauding his creditors, or putting his property beyond the reach of creditors.

Findings of Fact No. 12.

The above finding of fact is clearly supported by the evidence. The evidence shows that the bankrupt was harassed not by his general creditors or any creditor interested in this bankruptcy proceeding, but solely by his ex-wife, who threatened to attach any moneys which she could find on deposit in any bank account in the name of the bankrupt. His purpose of avoiding the tactics of his ex-wife is clearly commendable in this regard, in that he was at all times endeavoring to rehabilitate himself so that, perchance, he could carry out a plan whereby he might settle with his creditors since it was impossible for him to pay them off in full on his total indebtedness of approximately \$1,881,830.86. There was no evidence that the bankrupt opened the F. J. Ward bank account in order to delay, defraud or hinder any of his creditors. F. J. Ward was in truth and in fact an actual living person who was engaged in business with the bankrupt. This Mr. Ward testified that the purpose of opening the bank account was to have a place where

money could be deposited in connection with any future oil deal that could not be attached by the bankrupt's wife.

Transcript of testimony of Francis John Ward, page 21, line 1.

This same person, F. J. Ward, testified that the bankrupt had told him, in connection with the opening of this bank account, that there would not be any judgments against the bankrupt in Los Angeles.

Same transcript, page 22, line 7.

The evidence further shows that the F. J. Ward bank account was maintained openly and for a legal and meritorious purpose. The records of the Security First National Bank indicated on their face [209] that the bankrupt had an interest in said F. J. Ward bank account. The existence of this bank account was frankly disclosed by the bankrupt at the time, and in connection with, the filing of his petition in bankruptcy. Furthermore, the testimony shows that the bankrupt used this F. J. Ward bank account to pay his personal expenses and to pay his department store accounts.

Transcript Vol. 1, page 107, line 19 and following:

At no time did the bankrupt make or furnish a statement to any bank, creditor or person in which he failed to disclose the existence of the F. J. Ward bank account. Many checks were deposited by the bankrupt to the F. J. Ward bank account and many withdrawals were made by him of moneys on deposit in said account to persons, firms and corporations throughout the State of California, all having knowledge of the fact that the bankrupt had an interest in said account.

Although there was on deposit in said bank account the \$676.57 on August 28, 1940, there is no showing that this sum had not prior thereto been checked out. The bankrupt was not found to have been in contempt of Court by reason of the withdrawal of moneys from this bank account, nor was there any hearing in that regard. There is no evidence to support the contention that the bankrupt withdrew moneys from said bank account for the purpose of hindering, delaying or defrauding any of his creditors.

B. Assets From the Estate of Anne Gould Strotz,
Deceased.

The bankrupt was the executor of the estate of his deceased wife, Anne Gould Strotz, acting without bond, which estate was probated in the County of Los Angeles, State of California. The bankrupt's wife died on September 13, 1938 in the State of New York. Immediately thereafter and prior to the commencement of these bankruptcy proceedings, the bankrupt filed his petition to probate [210] the Will of his wife and to be appointed executor thereof. This petition thereupon became a public record, of which the general public had knowledge. The entire files of said probate proceedings were introduced in evidence in this matter. These files indicate on their face that the bankrupt was appointed the executor on October 25, 1938; that on the 28th day of October, 1938, he duly caused to be published in the Los Angeles News of Los Angeles, California, a Notice to Creditors of his wife to present their claims against her estate in the manner as prescribed by law; that on the 27th day of January, 1939, the Security First National Bank of Los Angeles filed a request for special notice in said probate

estate having received knowledge of the probate thereof by reason of said publication of Notice to Creditors; that the said petition for probate of Will showed on its face that the bankrupt was an heir and beneficiary of his wife's estate; that said petition showed on its face that the value of her estate was more than \$10,000.00.

Therefore, it must follow from the foregoing, that there certainly was no concealment of the fact that the bankrupt would probably inherit property from the estate of his deceased wife, which knowledge was publicized, as aforesaid, for several years prior to the commencement of these bankruptcy proceedings.

The evidence shows that the bankrupt paid all of the debts of his wife's estate in full and that he paid all of the income taxes and inheritance taxes out of moneys from said estate which it was required to pay.

Transcript Vol. 1, page 9, line 13 and following.

The evidence also shows that the bankrupt was the residuary beneficiary of his wife's estate, entitled to receive the bulk thereof. [211]

Transcript Vol. 2, page 102.

Now the bankrupt received approximately \$18,000.00 from the estate of his deceased wife after paying in full all of her debts, expenses of administration, income taxes and inheritance taxes.

The objecting creditor makes an issue of the fact that the bankrupt spent this \$18,000.00, and did not use it to pay approximately \$1,800,000.00 of his then existing debts. It also makes an issue of the fact that the bankrupt withdrew some of this \$18,000.00 from his

wife's estate prior to the final distribution thereof and without Court order.

No citation of authorities are submitted by the objecting creditor, and no authority exists for the contention that a beneficiary of an estate may not be paid moneys out of the estate without a court order therefor. The authorities are to the contrary. (In re Bennett's Estate, 13 Cal. (2d), 90 Pac. (2d) 84.) Assuming for the sake of argument that there is an authority for the contention *than* an executor may not pay out moneys to an heir of an estate even though he be the heir himself, without a Court order, nevertheless the only ones who could object to such acts would be the creditors of the estate of the deceased person and not creditors of the heir receiving the payment.

In this case there is no evidence to the effect that the bankrupt hindered, defrauded or delayed any creditor of his wife's estate by reason of payments which he made to himself out of the estate funds without an order of Court. As a matter of fact the probate proceedings show on their face that the bankrupt, as executor, duly and legally performed all of his duties and that he was entitled to his discharge as said executor.

The bankrupt testified that he used the \$18,000.00 which he received from his wife's estate to live and that he paid some of his creditors, and that he tried to settle with others. [212]

Reporter's transcript Vol. 1, page 35, line 26 and following.

At the time of his wife's death the bankrupt was left with certain obligations which he could not readily satisfy without some planning. Furthermore, the bankrupt had

at all times been accustomed to living on an expensive scale commensurate with the standard of living of other members of his family. The evidence shows that the bankrupt offered to settle a portion of his fantastic indebtedness by paying the sum of \$1,000.00 to one of his creditors. This offer was refused by that creditor.

Reporter's transcript Vol. 1, page 305, line 11.

It is rather obvious that good economy would dictate to the bankrupt to stretch his small inheritance in such a manner as to discharge all of his debts in the sum of \$2,000,000.00 or none at all. There was very little which he could be expected to do with \$18,000.00 in the face of owing nearly \$2,000,000.00 save to offer token settlements. The bankrupt's only hope for rehabilitation was to use a portion of this \$18,000.00 in some business venture, speculative though it might be, so that a possible windfall might result and large profits be thus obtained. This plan the bankrupt was never permitted to carry out because soon enough one of his creditors, having a judgment in a foreign jurisdiction, commenced an action in the Superior Court of the State of California in the County of Los Angeles against the bankrupt for moneys due. There was only one course open to the bankrupt as a result of this action and that was to commence bankruptcy proceedings.

At the time the said creditor commenced the action against the bankrupt based upon the foreign judgment, as aforesaid, all of the records of the court proceedings of the Superior Court in Los Angeles were open to the creditor. Certainly that creditor could not now say that the bankrupt concealed from it the fact that the bankrupt had an interest as an heir or beneficiary in his wife's

estate. No citation of authorities is necessary on the [213] question of law that the said creditor, having a foreign judgment, could not levy or attach any property belonging to the bankrupt located within the State of California until said foreign judgment was reduced to a judgment in the California jurisdiction. By reason thereof, the bankrupt was free to withdraw and spend moneys which he was entitled to receive from his wife's estate. His vigilance in this regard should not be and cannot be interpreted to be concealment.

C. Alleged Delay in Filing Inventory and Appraisement in Said Estate.

There was some confusion during the introduction of testimony in these proceedings concerning the date when the bankrupt, as executor of his wife's estate, caused to be filed an inventory of the assets thereof. This confusion is clarified by reading all of the testimony and not only a portion thereof. All of the testimony clearly discloses that the bankrupt filed an inventory in his wife's estate promptly after he received the bulk of the moneys to which the estate was entitled. The bulk of the moneys were received by him as executor of his wife's estate during the month of February, 1940, and the inventory was filed after the appraisement was completed, on March 12, 1940.

Transcript Vol. 1, page 309, line 7 and following, and page 310, line 24 and following.

Upon the request of said executor an inheritance tax appraiser was duly appointed by the Court as early as November 16, 1938; said appointment is a matter of public record; and any inquiry addressed to the appraiser

would have readily disclosed the character, nature and extent of the assets of said estate.

Certainly, the objecting creditor should not now be permitted to complain that there was a delay in the filing of said inventory because the delay, if any, of the filing of the inventory could not possibly result in damage to the objecting creditor. As a [214] matter of fact all of the creditors, including the Reconstruction Finance Corporation, had knowledge of the fact that an inventory would be filed merely from the fact that probate proceedings were pending. Any timely inquiry on the part of the objecting creditor would have disclosed any and all facts commencing with the date of the filing of the probate proceedings which were disclosed upon the filing of the inventory in said estate.

General Comments:

1. Extra Judicial Letter of Referee Utley.

The objecting creditor has called *called* attention of the Court to the fact that after the referee had made his Findings of Fact, Conclusions of Law and Order in this proceeding, he wrote a letter to one of the attorneys for the objecting creditor, in which certain expressions of opinion were made by the referee. In this connection the bankrupt contends that said letter cannot serve any useful purpose in this case and does not in any way modify or amend the Findings of Fact, Conclusions of Law and Order.

The letter is merely a friendly expression of opinion written, no doubt, to appease the wrath of counsel for the objecting creditor. It mentions the fact that "from a strictly technical point of view, upon the cold question of

whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered," that counsel's contention would be correct. (Whatever counsel's contention happens to be.) Nevertheless the bankrupt contends that this letter should not receive the dignity of a finding of fact in this proceeding.

2. The bankrupt was not afraid of any of the creditors who filed claims in this bankruptcy proceeding and was only concerned [215] with settling with those creditors in preference over his ex-wife.

3. Rehabilitation of Bankrupt.

The objecting creditor has denied that the bankrupt tried to rehabilitate himself by using moneys inherited from his wife's estate. In the first place there is no legal obligation on the part of one who inherits money to use that inheritance, small as it may be, for the purpose of discharging his debts, large as they may be. By misleading mathematics, the objecting creditor, on page 16 of its brief, adds "one and one" together and obtains a total of \$44,260.16. The objecting creditor starts with the sum of \$26,260.16, which it claims, is money the bankrupt deposited and withdrew in the Ward bank account, but fails to show the source of such deposits and the purpose of such withdrawal. As a matter of fact the moneys deposited by the bankrupt in the Ward bank account were moneys which he received in full from the estate of his wife, the net amount of which was \$18,000.00.

The objecting creditor erroneously duplicates these two items by adding them together, whereas they come from one and the same source. The evidence shows, in this connection, that the bankrupt withdrew moneys from the

estate of his wife and deposited such moneys in the F. J. Ward bank account. On one occasion the bankrupt withdrew moneys from the F. J. Ward bank account and re-deposited the moneys to the account of his wife's estate.

Reporter's transcript Vol. 1, page 296, line 14.

The bankrupt paid \$1000.00 to his attorney in Chicago and not \$500.00; \$1100.00 to Bekins Van & Storage and not \$600.00;

Reporter's transcript Vol. 1, page 297, line 20.

He paid \$700.00 to the trustees under the Will of Pauline D. [216] Rudolph.

Reporter's transcript Vol. 1, page 141, line 19 and following.

The bankrupt was left with "leases on all these obligations and everything else, and I spent that money in living and getting along with the exception of three trips that I took,".

Reporter's transcript Vol. 1, page 35, line 26 and following.

The bankrupt not only made a trip to Honolulu as admitted by the objecting creditor, but he went to New York and to Chicago and tried to make arrangements "to settle my other accounts."

Transcript Vol. 1, page 140, line 23.

4. Plan of Arrangement.

The sum of \$32,000.00 which is being offered in connection with the bankrupt's plan of arrangement is not his money but money belonging to his step-son, Jay Gould, the son of the bankrupt's deceased wife. This fact does not seem to be emphasized by the objecting creditor.

This is not a case of a bankrupt trying to bargain with his creditors and the court for the purpose of buying his discharge. The records in this bankruptcy proceeding clearly indicate that there are certain valuable properties in which the bankrupt at one time had an interest, but which are now being claimed by others.

Reporter's transcript of testimony of Francis John Ward page 3, line 24 and following.

The plan is being offered by the bankrupt's family so that his creditors would receive something in payment of their claims and so that the property in dispute would be released by the trustee to those who rightfully claimed the same. The records in these proceedings indicate that the actions at law to determine title to said property have been abated awaiting the confirmation of the plan of arrangement.

5. Assignment of Bankrupt's Interest in Trust Estate Created by His Father's Will. [217]

The bankrupt will receive nothing from his father's will even though he should survive his mother. It is not fair argument to say that the present plan of arrangement approved by a majority in number and amount of creditors should not be confirmed by the court merely because one of the creditors is in a better position to gamble for higher stakes than are the other creditors. As a matter of fact the bankrupt had assigned, many years ago, his entire interest in the estate of his deceased father as security for an indebtedness to the creditor, Pauline D. Rudolph. Assignment of a remaining interest which the bankrupt might have in his father's estate was made to the Continental Illinois National Bank and Trust Company of Chicago, Illinois. These assignees are satisfied

with the legality of the assignment of the bankrupt's interest in his father's estate, as aforesaid. A mere statement made by the objecting creditor that these assignments are invalid, is of course, not authoritative. In any event it might prove to be bad instead of good economy for the objecting creditor and other creditors to await the death of the bankrupt's mother and the adjudication of the validity of the bankrupt's assignments, as aforesaid, and the further possibility that the bankrupt would be even more heavily indebted on the day of reckoning than he is today. The plan of arrangement has been approved by a majority of the creditors in amount and number and it is for their best interests, and it is fair, equitable and feasible, and the proposal is made in good faith, and there is no reason why the bankrupt should not have his discharge.

6. Citation of Authorities.

(a) In re: Manasse, 125 Fed. 2d 647.

This case cited by the objecting creditor was clearly distinguished by the bankrupt in his answering points and authorities in opposition to the petition to review the order of the referee. Briefly, in that case; [218]

(a) The order of the referee was affirmed, although the order was one denying discharge.

(b) The bankrupt maintained a bank account in his wife's name without disclosing that fact to the bank nor did the bank records show that he was the owner of said bank account.

In our case the bankrupt did disclose to the bank and the bank's records did show that he had an interest in the

F. J. Ward bank account and the bankrupt could and did withdraw moneys from said account, upon his check and signature, to pay his debts in the community and elsewhere.

- (c) In that case the bankrupt failed to disclose the existence of the bank account in his schedule of assets,

whereas, in our case the bankrupt did disclose the existence of said account "in the statement of assets" filed together with his schedule of assets.

- (d) In that case the court found that the bankrupt was a lawyer and certainly knew, in opening an account in his wife's name, that he intended to defraud, delay and hinder his creditors.

- (e) In that case the court found that the bankrupt opened the bank account in his wife's name with the intent to conceal his money from his creditors,

whereas in our case the court found to the contrary.

Dated: March 29, 1944.

Respectfully submitted,

SIMON & GARBUS

By Morton Garbus

Attorneys for Bankrupt

[Endorsed]: Filed Apr. 5, 1944. [219]

[Title of District Court and Cause.]

PORTIONS OF TRANSCRIPT SUPPORTING
BANKRUPT'S DISCHARGE AND PLAN

I.

Keeping of Books and Records:

Vol. 1, Page 72, line 4.

Q. The Referee: Did you at any time keep books and records during the course of the transactions which resulted in your becoming indebted in the amount indicated?

A. Well, your Honor, that goes a long ways back and frankly I don't believe so. I don't believe I had any records. I had as I have explained before I was a partner of this brokerage firm. I organized the Chicago Stadium, in which I put a considerable amount of money with my brother

A. Well, the only thing I can say is that I have no recollection of having kept books and records. I can try to find old check books, but this goes back

Vol. 1, Page 99, Line 25

Q. When you were a partner in the brokerage company of Keech [220] and Company it kept books, did it not?

A. Yes sir.

Q. When you were interested in the Chicago, Illinois Stadium there were books kept with reference to the stadium transactions?

A. That is right.

Q. And since you lost the large sums of money and since the stock market crash the only business activities

in which you were engaged, were those you related here, the oil investments and the small motion picture enterprise?

A. Yes.

Q. You had no business of your own?

A. No.

Q. You were not engaged in business?

A. No sir.

Q. Therefore, you kept no books?

A. Correct.

Q. But you did make income tax returns showing what income you received for the years 1930, 1931, 1932, 1935, 1936 and 1937?

A. Yes. Some joint.

Q. In the years in which you did not file income tax returns you did not have any income?

A. Correct.

Vol. 1, Page 99, Line 16

Q. Mr. Strotz, you filed income tax returns for 1938 and 1939, also did you not for the estate?

A. For the estate, yes.

Q. And as the executor of the estate?

A. Correct, sir.

Q. And as executor of the estate you paid income taxes to the State of California and to the United States government for those two years?

A. Correct, sir. [221]

Vol. 1, Page 144, Line 20

Q. Do you have the cancelled checks of the Beach Petroleum Company?

A. Yes, sir.

II.

F. J. Ward Bank Account for Rehabilitation and Not
Concealment.

Testimony of F. J. Ward

Reporter's transcript of testimony of Francis John Ward,

Page 21, Line 1.

A. Well, I can't remember the exact conversation but I do remember that the idea was that there would be a place where money could be deposited in connection with any future oil deal that could not be attached by his wife.

Page 22, Line 7.

Q. And did he ever discuss with you the fact that some of these eastern creditors were coming out here to California causing him some annoyance?

A. As I remember he told me that he didn't think there would be any judgments out here in Los Angeles.

Testimony of Harold C. Strotz, Bankrupt:

Vol. 1, Page 107, Line 19.

Q. You had an account in the name of F. J. Ward?

A. That is right.

Q. What did you use that account for, the account in the name of F. J. Ward?

A. I used it as a bank account.

Q. To pay your personal expenses and things of that kind?

A. Yes.

Q. To pay your department store accounts?

A. Yes. [222]

III.

There Was No Concealment of Moneys From the Estate of Anne Gould Strotz, Deceased.

Testimony of Bankrupt:

Vol. 1, Page 35, Line 26.

Q. Now, the moneys that you received in your wife's estate appears to be, from the latter part of 1939 up until March of 1940, from *you* report appears to be approximately \$18,000.00. What did you do with that sum of money?

A. Well, I will have to explain the situation to you. My step-son was going to enter Harvard in the Fall of 1938 and we had just taken a house at 1118 Tower Road, Beverly Hills, and we went to New York and we took an apartment in New York at 375 Park Avenue and my wife committed suicide on the 13th of September, 1938, and it left me with these leases and all these obligations and everything else, and I spent that money in living and getting along with the exception of three trips that I took.

Q. Do you mean to say you spent approximately \$18,000.00 in six months just for living expenses?

A. No, I didn't say six months. I say from September, 1938 until about July of this year or June of this year (1941). My wife had an income of approximately \$36,000.00 a year and we spent well over \$2200.00 or \$2300.00 a month. Naturally, I cut it down as fast as I could but I couldn't get rid of the house until August of 1939.

Vol. 1, Page 140, Line 23.

A. Well, I went to Honolulu and I went to New York and I went to Chicago and I tried to make arrangements to settle my other accounts.

Vol. 1, Page 141, Line 19.

Q. The question is, have you any record of how you spent this \$17,000.00 you got from your wife's estate?

A. I explained to you I received it at different times. I [223] used some of it for living expenses and some for trips. I will try to break it down and give you an exact accounting, if that is what you want.

Q. You show a check made out for \$700.00 to the trustees under the Will of Pauline D. Rudolph, \$700.00. What was that for?

A. Well, if you want to go into the records you will find I paid them probably \$34,000.00 in interest at odd times in the last ten years. Most of it was paid in 1931 and 1932.

Vol. 2, Page 102.

I was the residuary beneficiary of the estate and withdrew funds from the estate account from time to time and used those funds for my personal benefit.

Vol. I, Page 9, Line 13.

A. I paid claims, paid taxes, paid expenses that I had which I was left with until I could get rid of the establishment that we had at the time.

Q. Now, the claims and taxes you say you paid out of this \$38,000.00, were they claims against the property of the estate of your wife?

A. Yes, claims against my wife.

Q. And the taxes?

A. And the taxes.

Vol. 1. Page 296, Line 14.

A. In the first place I returned to the estate \$3400.00, so it does not amount to \$11,500.00. You have the deposit back there later.

A. But it wasn't any \$11,500.00, I actually got around \$8000.00.

Vol. 1. Page 297, Line 20.

Q. You had \$8000.00?

A. I didn't say I had \$8000.00. I can tell you a few things I did with it. I paid my attorney \$1000.00 in Chicago; Bekins Van [224] and Storage \$1100.00. I will get the whole list for that, of what I paid and it can be all corroborated. Whether I had any of that money left at the time—I think I did have something because I was holding it to put back in the estate because the estate would need it.

Statement in the Record by Mr. Garbus
(Attorney for Bankrupt).

Vol. 1, Page 305, Line 11.

We offered \$1000.00 to settle that case. Mr. Dechter, and counsel was going to find out from his client whether it would be accepted, and he didn't seem to be anxious about it at all.

IV.

Delay in Filing Inventory in Estate of Bankrupt's
Deceased Wife.

Testimony of Bankrupt

Vol. 1, Page 306, Line 23.

A. In the first place if you will see, this money came at different times. The last of it arrived in February of 1940.

Q. No inventory and appraisalment was filed by you until about October, 1940?

A. I don't know. It was entirely in my attorney's hands. I didn't pay any attention to it.

Q. Did you have your attorney discuss the fact why an inventory should be filed?

A. I don't remember we did.

Mr. Garbus: No, we did not, Mr. Dechter.

Mr. Dechter: You have no explanation now to offer why the inventory was not filed until you were ready to close the estate?

Mr. Garbus: Just a moment, Mr. Strotz. I would like to know when the inventory was filed. You said October. Do you have that date?

Mr. Dechter: That is my recollection from Mr. Currer.

Mr. Garbus: Mr. Currer doesn't know. [225]

Mr. Dechter: You have your file here?

Mr. Garbus: I am sorry, I have not. If I did I wouldn't waste the court's time. I wanted to know where you got the date. If the money was received in February and we didn't file it (inventory) until October I would

like to know why. You may have the wrong date. Do you have the date? You made the statement now let us follow it through.

Vol. 1. Page 309, Line 7.

Now, can you tell me why between the 25th day of October, 1938 and the 12th day of March, 1940 no inventory and appraisalment had been filed by you although you had received and cashed before that time a sum in excess of \$40,000.00?

A. Well yes, I can tell you one of the reasons for it.

Mr. Garbus: Do I understand now the inventory was filed in March and not October of 1940?

Mr. Dechter: Your statement in your report has filled in in ink the 12th of March, 1940.

Mr. Garbus: What difference does it make whether ink or pencil, is that the date now, March or October?

Vol. 1, Page 310, Line 24.

Mr. Strotz: The result was that I never knew until early sometime in 1940 just exactly how much money my wife's estate would receive because the Commercial Trust Company of New Jersey finally made a statement in which they took back a great number of these mortgages.

V.

Evidence re: Assignment of Bankrupt's Interest in
Trust Estate Created by His Father's Will.

Testimony of Bankrupt

Vol. 1, Page 336, Line 24.

Q. I notice you executed an assignment of your interest in the trust to the estate of Pauline D. Rudolph.

Was that assignment [226] delivered to the Trust Company or the First National Bank of Chicago?

A. Yes sir.

Q. Did they accept it?

A. Why, you will have to ask them. I don't know whether they accepted it or not. I didn't deliver it. Her attorneys delivered it.

Q. There has been nothing done by you toward her estate or representatives in releasing or cancelling that assignment?

A. No sir.

Q. Was she related to you in any way, Mrs. Pauline D. Rudolph?

A. No sir.

Q. Just a business transaction?

A. Yes sir. I had formerly done business with her husband.

Q. I notice you also make a notation that you gave an order to the Continental Illinois National Bank and Trust Company to pay them a certain amount out of this trust.

A. Yes.

VI.

Bankrupt Paid Certain Debts to Creditors Immediately
Prior to Filing Petition Out of Money Inherited
From His Wife's Estate.

Testimony of Bankrupt.

Vol. 1, Page 334, Line 16.

Q. Have you made any payments to any creditors within the last year?

A. Yes, I have.

Q. To whom?

A. To Hamilton Vose, Jr.

Q. How much?

A. \$500.00.

Q. When was that?

A. In February, 1940. [227]

Q. And what was that for?

A. I was indebted to him.

Q. How long had you been indebted to him?

A. I had been indebted to him I think since 1931 or 1932.

Q. I notice a check, payment on account of principal and ten months interest to Mrs. Eleanor Voss. Is that the same party?

A. No, one is Voss and the other is Vose. They have no connection. Mrs. Eleanor Voss is the mother of my former wife.

Q. And that was an indebtedness of your former wife and not yours?

A. Correct.

Vol. 1, Page 311, Line 20.

If you will look, I paid all the accounts as fast as I could on bills and claims against the estate.

Vol. 1, Page 9, Line 13.

I paid claims, paid taxes, paid expenses that I had which I was left with until I could get rid of the establishment that we had at the time.

Vol. 1, Page 135, Line 19.

Q. You show Mrs. Bertha Feld, which you show as interest paid, \$773.98. What is that?

A. You will find she is one of the people I owed money to. I paid her interest, lots of it in the past years. If you want to go on I can show you thousands of cases I paid interest.

Q. Interest on a note she held?

A. Yes.

Q. Was that note secured in any way?

A. No sir, it is listed among my liabilities.

Vol. 1, Page 297, Line 22.

I paid my attorney \$1000.00 in Chicago; Bekins Van & Storage \$1100.00. I will get the whole list up for that of what I paid and it can be corroborated.

Dated: March 27, 1944.

SIMON & GARBUS

By Morton Garbus

Attorneys for Bankrupt

[Endorsed]: Filed Apr. 5, 1944. [228]

United States District Court
Southern District of California
Central Division

No. 37302-M. Bankruptcy.

In the Matter of

HAROLD C. STROTZ,

Bankrupt,

MEMORANDUM OF DECISION AND ORDER
ON REVIEW OF REFEREES' ORDERS.

Primarily, a misapprehension by some of counsel, as shown by their memoranda filed in the review, should be removed.

The only feature of the review of the referee's order dated December 2, 1942, considered and decided by the judge on May 15, 1943, was the legal question of the applicable State statute of limitations attachable to the so-called Vollentine claim. This clearly appears from the memorandum and order filed herein May 15, 1943, reference thereto and to notations thereof in the bankruptcy docket being hereby made.

Thus all issues undecided as aforesaid by the ruling of May 15, 1943, are now before the judge in reviewing the referees' orders dated December 2, 1942 and September 23, 1943, respectively.

The record before us is voluminous, both as to evidential matter and legal memoranda. We have considered it with care and have made proper allowance for the discretion and the prerogative of the trier of facts in reviewing orders of the referee.

The basic question in this review is whether the debtor is entitled under the Bankruptcy Act to have the amended plan under Chapter XI, filed May 27, 1942, confirmed in the face of objections by his principal creditor.

The ultimate solution of the problem turns upon whether the debtor has been guilty of any of the acts which would be a bar to the discharge of a bankrupt.

Section 14 of the Act, U. S. C., Title 11, Chapter 3, section 32, as far as pertinent is as follows: "The court shall grant the discharge unless satisfied that the bankrupt (debtor) has, (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy transferred, removed, destroyed, [229] or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay or defraud his creditors." This provision of the Act is expressly incorporated in and made a part of Chapter XI, and must be given consideration in arrangement proceedings such as the one under review.

While the learned referee evinced a deduction from the evidence that the debtor had resorted to methods calculated to conceal his property during the interdicted time, he concluded that the admitted and undisputed acts of the debtor to that end did not sufficiently establish an intent by the debtor to hinder, delay, or defraud his creditors. We think, after examining the record, that such conclusion is unwarranted and clearly erroneous.

Two outstanding and incontroverted transactions by the debtor, an experienced man of affairs, were designed to remove and conceal a substantial amount of his money and property from the reach of some of his creditors:

(1) An obvious instrument of concealment was the so-called F. J. Ward Bank Account, and (2) the irregular method of distributing the funds of the estate of Anna Gould Strotz, deceased, to himself as a residuary beneficiary without court order and the use of some of such money for his personal expenses, reasonably warrant no deduction but that of concealment to hinder and delay creditors.

That the concealment may not have injured the creditors has been held to be irrelevant, *Duggins v. Heffron*, (C. C. A. 9), 128 F. 2d 546, and it is also established by eminent authority that the concealment need not be from all the bankrupt's creditors, *Kolesinski v. Mashey*, (C. C. A. 2), 127 F. 2d 528.

The findings of fact, conclusions of law and order of the referee dated September 23, 1943, are confirmed in toto and adopted and made the findings of fact, conclusions of law and order of this court. Exceptions allowed Reconstruction Finance Corporation.

The findings of fact of the referee dated December 2, 1942, being numbered 1, 2, 3, 3a, 4, 5, 9, 10, 14, 15, 16, 18, 19, 20, to the [230] comma in line 19 of page 7, 22, 24, to the last word on line 25 of page 9, 26a and 27, are adopted and confirmed. All other findings dated December 2, 1942 are not adopted or confirmed but in lieu thereof from the record before the court on review the judge finds that the proposed plan of arrangement is not feasible, that the debtor has been guilty of acts which would be a bar to the discharge of a bankrupt under section 14(4) of the Act in establishing, maintaining and using as an instrumentality of concealment from creditors

the so-called F. J. Ward Bank Account in Security-First National Bank of Los Angeles, Hollywood and Cahuenga Branch, in which from October 22, 1939 until August 30, 1940, the debtor made many deposits, aggregating \$16,910.77, and issued many checks, as shown by Trustee's Exhibit 2 of the file transmitted by the referee.

Conclusions of law 1 and 2 dated December 2, 1942, are not adopted or confirmed, and are vacated, and in lieu thereof the court concludes that the evidence in support of the objection to the debtor's petition for confirmation of arrangement under Chapter XI of the Act requires that the referee's order approving the amended plan and discharging the debtor, dated December 2, 1942, be vacated and held for naught, and it is so ordered. The proposed amended plan of May 27, 1942, is rejected and this entire record and the files are returned to the referee in bankruptcy for appropriate proceedings in conformity with this memorandum and order.

Dated June 28, 1944.

PAUL J. McCORMICK
United States District Judge.

Order entered Jun. 28, 1944. Docketed Jun. 28, 1944. Book 26, page 380. Edmund L. Smith, Clerk. By B. B. Hansen, Deputy.

Notation made in Bankruptcy Docket on Jun. 28, 1944, pursuant to Rule 79(a), Civil Rules of Procedure.

[Endorsed]: Filed Jun. 28, 1944. [231]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF DECISION AND JUDG-
MENT BY DISTRICT COURT ON REVIEW OF
REFEREES' ORDER

To the Trustee in the above matter and to Raphael Dechter, his attorney:

To the Debtor and to Simon & Garbus, his attorneys:

To Eugenia Vollintine, claimant and to Harold L. Watt and Walter C. Durst, her attorneys:

You, and each of you, will please take notice that the decision and judgment of the Honorable Paul J. McCormick, United States District Judge on review of the Referees' Orders herein was filed and entered in the above entitled court on June 28, 1944.

Dated: July 5, 1944.

FRANK MICHELS and
JACOB J. LIEBERMAN,
By Jacob J. Lieberman
Attorneys for Reconstruction Finance
Corporation [232]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 6, 1944. [233]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harold C. Strotz, the bankrupt above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Decision and Order made and entered by the above entitled Court and Paul J. McCormick, United States District Judge, dated June 28, 1944, which said Decision and Order reverses the Order of the Referee herein dated December 2, 1942, which last mentioned Order granted the said bankrupt's petition for confirmation of arrangement under Chapter XI of the Bankruptcy Act, and discharging the said bankrupt from his debts as scheduled in the above proceeding.

Dated: August 3, 1944.

SIMON & GARBUS

By Morton Garbus

Attorneys for Bankrupt

[Endorsed]: Filed & mailed copy to attys for R. F. C.
Aug. 4, 1944. [237]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 247 inclusive contain full, true and correct copies of Debtor's Petition and Schedules; Adjudication and Order of Reference; Amendment to Schedule A-3; Petition for Arrangement under Chapter XI, Section 321; Amended Petition for Arrangement under Chapter XI, Section 321; Amendment to Petition for Arrangement as Amended; Referee's Certificate on Petition for Review; Specification of Objection to Discharge filed by Martin T. O'Brien, as Receiver etc. et al.; Specification of Objections to Discharge filed by Reconstruction Finance Corporation; Answer to Specification of Objection to Discharge; Objection of Creditor Continental Illinois National Bank and Trust Company of Chicago to Confirmation of Arrangement; Surrender of Security to Bankrupt Estate; Specifications of Objections to Amended Petition for Arrangement under Chapter XI, Section 321 filed by Reconstruction Finance Corporation; Consent of Creditor, Continental Illinois National Bank and Trust Company of Chicago; Trustee's Exhibit 2; Memorandum of Decision re: Objections to Discharge Trustee vs. F. J. Ward Meeting of Creditors as Required by Sec. 334; Proposed Findings of Fact, Conclusions of Law and Order; Objections to Proposed Findings of Fact, Conclusions of Law and Order and Petition for Reopening of

Hearings for Submission of Additional Testimony; Objections to Proposed Findings of Fact, Conclusions of Law and Order, upon Objections of R. F. C. to Bankrupt's Discharge and to Claim of Eugenia Vollentine; Two Stipulations filed Nov. 13, 1942 before Referee; Findings of Fact, Conclusions of Law and Order; Order for Extension of Time to File Petition for Review; Petition of Reconstruction Finance Corporation to Review Order Entered December 2, 1942; Points and Authorities in Support of Petition to Review Order of Referee Entered December 2, 1942; Answering Points and Authorities in Opposition to Petition to Review Order of Referee; Objections of Reconstruction Finance Corporation to Certificate Filed by Referee Ernest R. Utley upon its Petition to Review the Orders Entered by said Referee December 2, 1942 and Proposed Summary of Evidence; Memorandum and Order Re-Referring Proceedings to Referee; Brief of Reconstruction Finance Corporation of Facts Upon its Objections to Bankrupt's Discharge and Plan of Arrangement; Portions of Transcript Supporting Objections of Reconstruction Finance Corporation to Bankrupt's Discharge and Plan; Reply Brief of Bankrupt in Support of his Discharge and Plan of Arrangement; Portions of Transcript Supporting Bankrupt's Discharge and Plan; Memorandum of Decision and Order on Review of Referee's Orders; Notice of Entry of Decision and Judgment by District Court on Review of Referee's Order; Petition for Rehearing; Minute Order Entered July 24, 1944; Notice of Appeal; Cash Bond

on Appeal; Stipulation Extending Time to File Designation of Contents of Record on Appeal and Order; Designation of Contents of Record on Appeal and Designation of Additional Contents of Record on Appeal Submitted by Reconstruction Finance Corporation, Appellee which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record on appeal amount to \$66.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30th day of October, 1944.

[Seal]

EDMUND L. SMITH,
Clerk,
By L. Wayne Thomas,
Deputy Clerk.

[Endorsed]: No. 10909. United States Circuit Court of Appeals for the Ninth Circuit. Harold C. Strotz, Appellant, vs. Reconstruction Finance Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 31, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10909

In the Matter of

HAROLD C. STROTZ,

Bankrupt.

APPELLANT'S STATEMENT OF POINTS AND
DESIGNATION OF PARTS OF RECORD ON
APPEAL RULE 19 (6)

Comes now the appellant, Harold C. Strotz, bankrupt, in the above entitled matter, and files his statement of the points on which he intends to rely on the appeal, and designates the parts of the record which he thinks necessary for the consideration thereof, as follows:

Statement of Points on Which Appellant Relies:

1. That the evidence does not support the memorandum of decision and order on review of Referee's orders, signed by Paul J. McCormick, United States District Judge, and dated June 28th, 1944.
2. That there is not sufficient evidence in support of the order to the effect that the bankrupt transferred, removed, destroyed or cancelled, or permitted to be removed, destroyed or cancelled any of his property with intent to delay, hinder or defraud his creditors.
3. That there is not sufficient evidence to support the order to the effect that the bankrupt had any creditors whom he could have intended to hinder, delay or defraud.

4. That the bankrupt's amended petition for arrangement under Chapter 11, Section 321, filed in the bankruptcy proceedings on July 2, 1941, and his amendment thereto filed May 27, 1942, should have been approved and his discharge granted.

* * * * *

Respectfully submitted,

SIMON & GARBUS

By Morton Garbus

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR DIMINUTION OF RECORD
ON APPEAL

It is hereby stipulated by and between counsel for the parties to the above entitled appeal as follows:

That in lieu of the entire reporter's transcript of testimony taken in the lower Court, only the portions thereof as are contained within Items 11 and 13 of Appellant's Statement of Points and Designation of Parts of Record on Appeal, being (11) Reconstruction Finance Corporation's Portions of Transcript Supporting Objections of Reconstruction Finance Corporation to Bankrupt's Discharge and Plan filed on or about March 23, 1944, and being (13) Bankrupt's Portion of Transcript Supporting his Discharge and Plan of Arrangement filed on or about March 29, 1944, be relied upon in this appeal, as the pertinent testimony, provided that all of the items set forth in the Designation of Additional Contents of Record on Appeal Submitted by Reconstruction Finance Corporation, Appellee (Rule 75), shall be printed and considered upon said appeal.

Dated: December 7, 1944.

SIMON & GARBUS.

By Morton Garbus

Attorneys for Appellant

Frank Michels

Jacob J. Lieberman

Attorneys for Appellee

[Endorsed]: Filed Dec. 11, 1944. Paul P. O'Brien,
Clerk.

No. 10909.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HAROLD C. STROTZ,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION,

Appellee.

APPELLANT'S OPENING BRIEF.

SIMON & GARBUS,
242 North Canon Drive, Beverly Hills,
Attorneys for Appellant.

FILED

FEB 21 1944



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No. 10909.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD C. STROTZ,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
TION,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Statement of Pleadings and Facts.

This is an appeal from an order of the District Court of the United States, Southern District of California, Central Division, in bankruptcy, Paul J. McCormick, Judge, reversing the order of the Referee, Ernest R. Utley, which order confirmed the Appellant's plan of arrangement under Chapter XI, and granted his discharge in bankruptcy.

The said District Court acquired jurisdiction of this proceeding, as a court of bankruptcy, pursuant to Chapter II, Section 2, Bankruptcy Laws, 1938.

The United States Circuit Court of Appeals for the Ninth Circuit, has jurisdiction of this appeal pursuant to Chapter IV, Section 24, Bankruptcy Law, 1938, this being

an appeal from a final order made and entered by the said District Court sitting therein as a court of bankruptcy. The total amount of the bankrupt's indebtedness as set forth in his schedule and amendment thereto is in the sum of \$2,127,641.86. The total amount of claims filed in said bankruptcy proceeding by the creditors of the bankrupt is in the sum of \$696,961.53. The claim of the Reconstruction Finance Corporation, the Appellee in this proceeding, is in the sum of \$340,566.44, being based on an original claim of \$210,000.00, plus an accumulated interest thereon over a period of approximately eight years.

The Appellant filed his petition and was adjudged a bankrupt pursuant thereto on October 23, 1940. [Tr. of Rec., p. 2.] Appellee thereafter filed its specifications of objection to discharge of the bankrupt. [Tr. of Rec., p. 63.] Appellant filed his written denial thereto. [Tr. of Rec., p. 68.] He then presented and filed on April 31, 1941, his petition for arrangement under Chapter XI, Section 231. [Tr. of Rec., p. 37.] Said petition having been rejected by a majority in amount and number of creditors, Appellant thereafter, on July 2, 1941, filed his amended petition for arrangement. [Tr. of Rec., p. 44.]

The Appellee filed its specifications of objections to said amended petition for arrangement. [Tr. of Rec., p. 70.]

Thereupon Appellant presented and filed an amendment to his petition for arrangement as amended. [Tr. of Rec., p. 51.] Said amendment to petition for arrangement as amended having been approved by a majority of the creditors of the bankrupt in amount and number, and Appellee, being the only objecting creditor, the Referee, on August 7, 1942, made and entered his decision confirming said plan of arrangement as amended. [Tr. of Rec., p. 75.]

Proposed findings of fact, conclusions of law and order were then submitted by the Appellant for the signature of the Referee. [Tr. of Rec., p. 84.]

Appellee then submitted and filed its objections to the said proposed findings of fact, conclusions of law and order, and petitioned the court for re-opening of hearings for submission of additional testimony. [Tr. of Rec., p. 92.]

The Referee then made and entered his findings of fact, conclusions of law and order confirming the said amended petition for arrangement as amended on December 2, 1942. [Tr. of Rec., p. 115.]

Appellee, on December 12, 1942, then filed its petition to review the order of the Referee made and entered as aforesaid. [Tr. of Rec., p. 130.]

Appellee then filed its objections to the certificate of the Referee, upon its petition to review the orders entered by the said Referee on December 2, 1942, and together therewith submitted its proposed summary of the evidence of the proceeding. [Tr. of Rec., p. 152.]

The said order of the Referee was then reviewed by the Lower Court, and the Appellant and Appellee, having argued the matter as to whether the Referee's order confirming the Appellant's plan of arrangement as amended should be affirmed or rejected, the Court then, on May 15, 1943, made its memorandum and order re-referring the said proceedings to the Referee, in order to determine the ultimate validity of a claim of one of the creditors, and thus to determine whether adequate creditors in number and amount have accepted the Appellant's plan of arrangement. [Tr. of Rec., p. 163.]

The Referee thereupon found that the said creditor's claim was valid, and determined that adequate creditors in number and amount had accepted the Appellant's plan of arrangement.

The matter then again came on for hearing before the Honorable Paul J. McCormick for affirmation or rejecting the order of the Referee, as aforesaid. In this connection there was no oral argument, each side submitting the matter on briefs.

The Court then announced that it would not have sufficient time to read the entire reporter's transcript of the evidence in the proceedings and requested that each side submit the portions of the reporter's transcript which he or it believed would be in support of the briefs filed.

Portions of the transcript supporting the Appellant's discharge and plan were presented and filed by him on March 27, 1944. [Tr. of Rec., p. 234.]

A stipulation for diminution of the record on appeal consenting to this appeal, being confined to the evidence as it appears in the said portions of the reporter's transcript in lieu of the entire reporter's transcript of testimony taken in the Lower Court, was presented and filed in the above entitled Court on December 7, 1944. [Tr. of Rec., p. 256.]

The Lower Court made and entered its memorandum of decision and order on review of the Referee's orders on June 28, 1944, reversing the order of the Referee. [Tr. of Rec., p. 245.]

The Appellant filed his notice of appeal from the order of the Honorable Paul J. McCormick, dated June 28, 1944, as aforesaid, which notice of appeal was filed herein on August 3, 1944. [Tr. of Rec., p. 250.]

II.

Statement of the Case.

The question to be determined on this appeal is whether the Appellant committed acts which would be a bar to his discharge in bankruptcy and thus be not entitled to have his plan of arrangement confirmed.

The Appellant was indebted at the time of filing his voluntary petition in the sum of \$2,127,641.86 to numerous creditors including the Appellee herein. All of this indebtedness arose out of the 1929 stock market crash and the economic depression which followed within two or three years thereafter. [Referee's Findings of Fact, No. 2, Tr. of Rec., p. 116.]

In 1936 the Appellant married a lady of some wealth who, upon her death, on September 13, 1938, bequeathed to him a net estate of approximately \$11,500.00. This money was the only property or estate of consequence which came into his hands between August 12, 1930 and October 22, 1940, the date of the filing of the petition in bankruptcy herein. [Referee's Findings of Fact, No. 23, Tr. of Rec., p. 124.] A step-son of the Appellant, Jay Gould, financially assisted the Appellant from time to time prior to the filing of the petition in bankruptcy; and offered to contribute a substantial sum of money to the Appellant which he could voluntarily submit to his creditors in accordance with the various plans of arrangement filed herein, as aforesaid. [Referee's Findings of Fact, No. 24, Tr. of Rec., pp. 124 and 125.]

A majority of creditors in amount and number finally approved a plan of arrangement by the terms of which the sum of \$32,000.00 would be paid to the creditors.

There was only one objecting creditor, that one being the Appellee.

The reversal of the order of the Referee was based upon what the Honorable Paul J. McCormick terms "two outstanding and incontroverted transactions by the debtor, an experienced man of affairs, designed to remove and conceal a substantial amount of his money and property from the reach of some of his creditors." One of these transactions is referred to as the so-called F. J. Ward bank account and as being an obvious instrument of concealment; the other is the alleged irregular method of distributing the funds of the estate of Anna Gould Strotz to himself as a residuary beneficiary without court order and the use of some of such money for his personal expenses. [Tr. of Rec., pp. 246 and 247.] These two transactions will be fully discussed in the argument of the case hereinafter presented.

III.

Specification of Errors Relied Upon.

A. The evidence does not support the findings of the United States District Court, as follows:

1. That the so-called F. J. Ward bank account was an obvious instrument of concealment.

2. That it was necessary for the Appellant, as executor of the estate of his deceased wife, to obtain a court order permitting him to distribute funds from said estate to himself as a residuary beneficiary.

3. That the distribution of funds from the estate of the deceased wife of the Appellant without a court order warrants the deduction that he thus intended to, or did conceal from, or defraud, hinder or delay his creditors.

B. That there is not sufficient evidence in support of the order of the Lower Court to the effect that the Appellant transferred, removed, destroyed, or concealed any of his property with intent to delay, hinder or defraud his creditors.

C. That the Appellants amended petition for arrangement under Chapter XI, Section 321, as amended, should have been approved and his discharge granted.

IV.

Argument of the Case.

A. There is not sufficient evidence in support of the order of the Lower Court to the effect that the Appellant transferred, removed, destroyed or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to delay, hinder or defraud his creditors

1. The fact that the Appellant opened a bank account together with and in the name of his business associate F. J. Ward, does not make the act an "obvious instrument of concealment" as found by the Lower Court.

2. The fact that the Appellant, as executor of the estate of his deceased wife, distributed moneys from said estate to himself as a residuary beneficiary without an order of court, and the use of some of such moneys for his personal expenses, does not warrant a deduction that he thereby concealed, hindered or delayed his creditors.

B. The Appellant had no creditors who could have attached or levied execution upon the F. J. Ward bank account or the Appellant's share in his wife's estate.

C. There is no evidence in this case in support of the finding of the Lower Court to the effect that the proposed plan of arrangement is not feasible.

D. Appellate Court should not give the same weight to the findings of the District Court as it does to the findings of the Referee.

A. There is not sufficient evidence in support of the order of the Lower Court to the effect that the Appellant transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed, any of his property with the intent to delay, hinder or defraud his creditors.

1. The fact that the Appellant opened a bank account together with and in the name of his business associates, F. J. Ward, does not make the act an "obvious instrument of concealment," as found by the Lower Court.

The Referee made a finding to the effect that the Appellant did not conceal any of his property for the purpose of hindering, delaying or defrauding his creditors in connection with his having opened and maintained the so-called F. J. Ward bank account. Although there may be evidence in some measure conflicting in this regard, there is substantial evidence in support of this finding. While it is true that the appellant made deposits in said bank account aggregating \$16,910.77 between October 22, 1939 and August 30, 1940, the Referee nevertheless found, and the evidence supported the finding, that there was but a small sum of money on deposit in this account at any one time within the twelve months prior to the commencement of the bankruptcy proceedings. [Referee's findings of fact, No. 12, Tr. of Rec., pp. 119 and 120.]

After listening to all of the testimony and having an opportunity to observe the Appellant on the witness stand, the Referee made a finding that the so-called F. J. Ward bank account was not maintained by the Appellant for the purpose of hindering, delaying or defrauding his creditors, or putting his property beyond the reach of his creditors. [Referee's Findings of Fact, No. 13, Tr. of Rec., p. 120.]

F. J. Ward was in truth and in fact an actual living person who was engaged in business together with the Appellant at a time when the Appellant was endeavoring to rehabilitate himself and perchance "strike it rich," so to speak, by wild-catting in the oil business. The witness, F. J. Ward, testified in this regard as follows:

"Well, I can't remember the exact conversation but I do remember that the idea was that there would be a place where money could be deposited in connection with any future oil deal that could not be attached by his wife." [Portions of Rep. Tr. appearing in Tr. of Rec., p. 236.]

The evidence clearly shows that the F. J. Ward bank account was maintained by the Appellant openly and for a legal and meritorious purpose. The bank records indicated on their face that the Appellant had an interest in the said F. J. Ward bank account. [Trustee's Exhibit No. 2, Tr. of Rec., p. 195.] The Appellant did not conceal that fact from the bank or from any of his creditors. The existence of this bank account was frankly disclosed by the Appellant at the time, and in connection with, the filing of his petition in bankruptcy. The trustee obtained the information as to the existence of the F. J. Ward bank account solely and directly from the Appellant, and from no other source, upon the reading of the statement attached to the

petition in bankruptcy filed by the Appellant herein. In other words, this is not a case, and there is no evidence to the effect, that the Appellant failed to disclose, under oath or otherwise, the existence of the F. J. Ward bank account at any time. The bank account was not used as a secret depository but, on the contrary, it was an open and current account against which the Appellant wrote hundreds of checks which were issued by him to merchants throughout the entire county of Los Angeles and elsewhere. [See Trustee's Exhibit No. 2, Tr. of Rec., pp. 195 to 203.]

Certainly the finding of the Referee that the F. J. Ward bank account was not "an instrument of concealment" is supported by the evidence, as aforesaid, to the effect that the bank account was used openly. The contrary finding of the District Court is not supported by the evidence, and should not be given as much weight as the finding of the Referee who had the witnesses before him, observed their demeanor and was thus better able to determine their credibility.

The Appellant testified, with reference to the F. J. Ward bank account, that he used the same as a bank account for the purpose of paying his personal expenses including the department store accounts. The evidence in this regard is as follows:

"Q. You had an account in the name of F. J. Ward? A. That is right.

Q. What did you use that account for, the account in the name of F. J. Ward? A. I used it as a bank account.

Q. To pay your personal expenses and things of that kind? A. Yes.

Q. To pay your department store accounts? A. Yes." [Portions of Rep. Tr. appearing in Tr. of Rec., p. 236.]

At no time did the Appellant make or furnish a statement to any bank, creditor or other person whereby he failed to disclose the existence of the F. J. Ward bank account. Certainly this is not consistent with a finding that this account was "an instrument of concealment."

It is true that the Appellant voluntarily stated, in answer to a question, that one of the purposes of the F. J. Ward account was to prevent his "former wife" (not a creditor in this proceeding), from attaching his moneys. However, this is consistent with the plan of the Appellant to maintain a bank account which might better aid him in rehabilitating himself in some form of business without being embarrassed or harassed. The appellant testified in this regard that he was "continually harassed by sheriff's orders or something like that" and that he was 'just afraid to try and do anything.' [Portions of Rep. Tr. appearing in Tr. of Rec., p. 193.]

In this regard, however, there was no evidence introduced at any time to the effect that any of his creditors attempted to attach his bank account.

The mere fact that a person opens a bank account in the name of another is not presumptive evidence of the fact that the said bank account is used as an "instrument of concealment." If a person were intending to conceal money the last thing he would do would be to deposit that money in a bank account, whether in his name or in the name of another person. The law does not compel a person to deposit his money in a bank account. How then can it be maintained by the Lower Court that the F. J. Ward bank account was "an instrument of concealment"?

2. The fact that the Appellant, as executor of the estate of his deceased wife, distributed moneys from said estate to himself as a residuary beneficiary without an order of court, and the use of some of such moneys for his personal expenses, does not warrant a deduction that he thereby concealed, hindered or delayed his creditors.

The Appellant was the executor of the estate of his deceased wife, Anne Gould Strotz, acting without bond, which estate was at all times being probated in the County of Los Angeles, State of California. Certainly there was no concealment with reference to the probate of this estate by the Appellant. Immediately after the death of his wife, the Appellant filed his petition to probate her will and to be appointed executor thereof. It goes without saying that this petition for probate became a matter of public record to which the general public had access. Said petition for probate indicated on its face that the Appellant was an heir and beneficiary of the estate of his deceased wife, and that the value of her estate was more than \$10,000.00. In this regard the Referee made a finding as follows:

“That said probate estate and all of the proceedings held therein were at all times open to the general public and to the creditors of this bankrupt who, upon inquiry, could have determined the amount and nature and assets of said estate and the interest therein of the bankrupt” [Tr. of Rec., p. 123.]

It is true that the Appellant distributed to himself as beneficiary of the estate of his wife, and while acting as the executor of said estate, the net sum of approximately \$11,500.00. The Lower Court found that this distribution to himself by the Appellant was irregular, since there

was no court order authorizing final distribution at the time of payment. It is respectfully submitted that the Lower Court is in error in maintaining that said payment was "irregular." Certainly the payment was not "illegal."

It has been held by the Supreme Court of the State of California in the case of *in re: Bennett's Estate*, 13 Cal. (2d) 354, 90 p. (2d) 84, that it is not unlawful for an executor of an estate to make distribution of the assets thereof to the legatees without first obtaining a court order.

The evidence is uncontradicted that the Appellant, as executor of his wife's estate, and prior to making distribution to himself, paid in full all claims against the estate, all taxes and expenses of administration out of a gross estate of \$38,000.00 from which he netted \$11,500.00. The evidence in this regard is as follows:

"A. I paid claims, paid taxes, paid expenses that I had which I was left with until I could get rid of the establishment that we had at the time." [Portions of Rep. Tr. appearing in Tr. of Rec., pp. 238 and 239.]

The Lower Court takes objection to the fact that the Appellant used some of the moneys received by him, as beneficiary, from his wife's estate for the purpose of paying his current living expenses. [Tr. of Rec., p. 247.] There is nothing unlawful in that: at best he would be thus making a preference in paying current rather than old debts. Could it reasonably be maintained that by so doing the Appellant concealed his property, or hindered or delayed his creditors? At the time of filing his petition in bankruptcy, the Appellant included a statement therein to the effect that he then had a remaining interest in the

estate of his deceased wife. Furthermore, attempts were made by the Appellant to settle with certain of his creditors out of the proceeds received by him from his wife's estate. The Appellant testified that actually he received less than the net of \$11,500.00 since he had to use some of that amount for the business of the estate, his testimony in this regard is as follows:

“A. In the first place I returned to the estate \$3,400.00, so it does not amount to \$11,500.00. You have the deposit back there later.

A. But it wasn't any \$11,500.00, I actually got around \$8000.00. [Portions of Rep. Tr. appearing in Tr. of Rec., p. 239.]

It must be remembered that the Appellant was indebted in an amount in excess of \$2,000,000.00. After a lapse of approximately seven years, during which period he had no moneys of any consequence, he finally came into possession of approximately \$11,500.00. Little could have been expected from the Appellant in connection with meeting his obligations in the fabulous sum, as aforesaid. His only hope was to make token offers of settlement. This the Appellant did in certain cases and offered to do in others. In this connection the Appellant testified as follows:

“Q. Have you made any payments to any creditors within the last year? A. Yes I have.

Q. To whom? A. To Hamilton Vose, Jr.

Q. How much? A. \$500.00. [Portions of Rep. Tr. appearing in Tr. of Rec., pp. 242 and 243.]

Q. You show Mrs. Bertha Feld, which you show as interest paid, \$773.98, what is that? A. You

will find she is one of the people I owed money to. I paid her interest, lots of it in the past years. If you want to go on I can show you thousands of cases I paid interest. [Portions of Rep. Tr. appearing in Tr. of Rec., p. 244.]

I paid my attorney \$1,000.00 in Chicago; Bekins Van & Storage, \$1100.00. I will get the whole list for that of what I paid and it can be corroborated." [Portions of Rep. Tr. appearing in Tr. of Rec., p. 244.]

The Appellant made an offer, out of the proceeds derived from his wife's estate, to settle with one of his creditors. He testified in this regard as follows:

"We offered \$1,000.00 to settle that case, Mr. Dechter, and counsel was going to find out from his client whether it would be accepted, and he didn't seem to be anxious about it at all." [Portions of Rep. Tr. appearing in Tr. of Rec., p. 239.]

Good economy would dictate to the Appellant that he should stretch his small inheritance in such a manner to discharge, if possible, all of his debts, which then exceeded the sum of \$2,000,000.00. There is very little else which he could have been expected to do with \$11,500.00, in the face of so overwhelming an indebtedness. To deny the Appellant his discharge in bankruptcy in the face of his tremendous debt and under the circumstances of this case would be to sentence him to everlasting financial and spiritual death, and to destroy the effect of the bankruptcy law as intended by Congress in a case such as this.

B. The Appellant had no creditors who could have attached or levied execution upon the F. J. Ward bank account or the Appellant's share in his wife's estate.

The Referee made an expressed finding to the effect that at the time the Appellant withdrew moneys from the estate of his deceased wife, there was no creditor of the Appellant then in a position to reach said money by levy of attachment or execution upon any judgment. [Tr. of Rec., p. 122, Finding No. 20.]

It is quite true that had the Appellant concealed from any of his creditors or hindered, delayed or defrauded any one of them within one year prior to the commencement of the bankruptcy proceedings, his discharge should be denied. However, there is no evidence in this case that the Appellant had *any* creditors whom he had hindered, delayed or defrauded.

The Lower Court relied on the case of *Duggins v. Hefron*, (C. C. A. 9), 128 F. (2d) 546, to the effect that it is irrelevant whether the concealment did or did not injure the creditors. In that case the Referee's findings were affirmed by the District Court. The concealment consisted of the bankrupt transferring real property to his wife and then failing to list that property in his schedule and swearing falsely with reference thereto. That case is not in point and has no bearing upon the facts in the case at bar. In the case at bar there was no property which the Appellant concealed from his creditors, and there was no finding of any false oath or statement on his part.

The Lower Court also relies upon the case of *Kolesinski v. Mashey*, (C. C. A. 2), 127 F. (2d) 528, to the effect that a concealment need not be from *all* of the creditors. In that case the bankrupt was examined in supplementary proceedings and was asked to produce all judgments held by him; he produced only worthless judgments but failed to produce the only judgment having any value. Quite obviously that was a concealment. But that case differs from the case at bar in that there was no supplementary proceeding or any examination of the Appellant at any time prior to bankruptcy during which he failed or refused to disclose his property, nor did he ever make false, fraudulent or incomplete statements to any of his creditors at any time.

C. There is no evidence in this case in support of the finding of the Lower Court to the effect that the proposed plan of arrangement is not feasible.

The Referee concluded from the facts that the proposed plan of arrangement was fair and equitable and for the best interests of the creditors. [Tr. of Rec., p. 127, Conclusion No. 2.]

The District Court, however, made a finding that the proposed plan of arrangement "is not feasible." [Tr. of Rec., p. 247.]

There is no evidence in the record to warrant or support the finding of the District Court in that regard. In any event appellant would be entitled to his discharge with or without the offered plan. The offer to pay \$32,000.00 to his creditors is a voluntary act suggested by Jay Gould, the appellant's stepson.

D. Appellate Court should not give the same weight to the findings of the District Court as it does to the findings of the Referee.

It will be remembered, in this case, that the District Court reversed the order of the Referee granting to the Appellant his discharge, and approving his plan of arrangement whereby his creditors would receive the sum of \$32,000.00 in cash. The District Court had no opportunity to hear the testimony of the witnesses and thus to determine their credibility, since only the cold record was available to the District Court. The record will show that numerous hearings were held before the Referee during which the Appellant and other witnesses testified at length with reference to the matters presented on this appeal. The Referee determined, after hearing all of the evidence and observing the demeanor of the witnesses, including the Appellant, that the Appellant had no intent to hinder, delay or defraud any of his creditors either in connection with the opening and maintaining of the so-called F. J. Ward bank account, or in making payments to himself as beneficiary of his wife's estate, without first obtaining a court order. At best there was a conflict of evidence on the question of concealment and intent to hinder, delay or defraud. It cannot be said that, as a matter of law, the mere opening of a bank account in the name of another is a "concealment," nor that merely by obtaining an advance as beneficiary, without a court order, one intends to conceal from his creditors.

It has been held that an Appellate Court will not give the findings of the District Court the same weight as if that court had seen and heard the witnesses, or had

affirmed the findings by the Referee by whom the witnesses had been seen and heard.

Wilson v. Hall, 81 F. (2d) 918.

The foregoing case relies upon the general order in *bankruptcy 47, Section 11 U. S. C. A., following Section 53*. That order is as follows:

"The reports of referees . . . shall be deemed presumptively correct but shall be subject to review by the Court, and the Court may adopt the same, or may modify or reject the same in whole or in part when the Court in the exercise of its judgment is fully satisfied that error has been committed."

In this case we are confronted with the findings and conclusions of the District Court which are contrary to the findings and conclusions of the Referee. A similar situation occurred and was discussed in the case in *re: Minota Building Co.*, 92 F. (2) 644, where the court stated as follows:

"The Referee was the trier of the facts. He had these witnesses before him. In testing their credibility and the weight of their evidence, he had a distinct advantage over this Court and the Court below, neither of which ever had before it anything more than the cold record. The frankness and fairness shown by the witnesses, their attitude upon the witness stand and the extent to which their testimony was colored, if it was colored at all, by self interest, were important considerations in weighing their evidence and determining their credibility . . . the determination of a Referee in bankruptcy of issues of fact, based upon the evidence of witnesses appearing in person before him, where such determination must rest upon the credibility of the witnesses and

the weight of their evidence should ordinarily be accepted upon review, except in those cases where it is obvious that the Referee has made a mistake.”

How can it reasonably be said that the Referee made “a mistake” in the case at bar? The Appellant told the Referee that when he opened the F. J. Ward bank account he did so merely for the purpose of preventing his former wife, who was not one of his creditors in this bankruptcy proceedings from interfering with his money matters. The Referee believed the Appellant. The Appellant told the Referee that he used that bank account openly and notoriously to pay his bills and to carry out the little business upon which he hoped to build his future. The Referee believed the Appellant in that regard. The witness, F. J. Ward, testified that the idea behind the opening of the F. J. Ward bank account was “that there would be a place where money could be deposited in connection with any future oil deal that could not be attached by his wife.” [Portions of Rep. Tr. appearing in Tr. of Rec., p. 236.] The Referee believed the witness, F. J. Ward in that regard. The Appellant testified in person before the Referee that all of the debts of the deceased wife of the Appellant and all of her taxes and expenses of administration were paid in full, as aforesaid. The Referee believed the Appellant in that regard. The Appellant also testified that he offered to make settlements with certain of his creditors out of the moneys received by him from his wife’s estate, and that he paid some of his creditors out of said moneys. The Referee believed the Appellant in that regard.

On what theory, therefore, could the District Court justifiably reverse the order of the Referee?

V.

Conclusion.

We respectfully submit that the order of the District Court should be reversed and that the Appellant is entitled to have his plan of arrangement confirmed and be granted his discharge in bankruptcy.

Respectfully submitted,

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By MORTON GARBUS,

Attorneys for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

HAROLD C. STROTZ,	}	<i>Appellant,</i>
<i>vs.</i>		
RECONSTRUCTION FINANCE CORPORATION,		

BRIEF OF APPELLEE.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HAROLD C. STROTZ,
Appellant,

vs.

RECONSTRUCTION FINANCE
CORPORATION,
Appellee.

BRIEF OF APPELLEE.

STATEMENT.

Harold C. Strotz, the bankrupt, was formerly a resident of Chicago, Illinois. About five years prior to the filing of his bankruptcy petition he moved to California. He was the son of Charles Nicolas Strotz who died at Chicago, Illinois, in 1928 (Tr. 29), who left a will creating a trust of which The First National Bank of Chicago and the bankrupt are trustees, the corpus of which is held by The First National Bank of Chicago as such trustee in the State of Illinois. The assets of the trust exceed one million dollars. The bankrupt's mother receives the income dur-

ing her life. The annual net income of the trust exceeds \$30,000. Under the provisions of the trust it terminates upon the death of his mother and the bankrupt then is to receive one-third of the principal thereof. Paragraph XXII contains a "spendthrift clause" under the terms of which the interest of the bankrupt is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same nor subject to the claims of creditors of the bankrupt. Under the laws of Illinois where said trust exists, said provision is valid and certain purported assignments by the bankrupt of said interest, hereinafter referred to, are void (Tr. 42, 137, 212).

Harold C. Strotz filed his voluntary petition in bankruptcy in this cause October 22, 1940 (Tr. 2). The original schedule listed claims of unsecured creditors aggregating \$477,854.14 (Tr. 20). The claim of the RFC was not listed in the original schedule. Two secured claims were listed: one of Pauline D. Rudolph in the amount of \$802,411.77 (Tr. 9), and Continental Illinois Bank of Chicago in the amount of \$30,999.93 (Tr. 12). The security held by these creditors was a purported transfer by the bankrupt of his interest in the residuary trust estate created by the will of Charles Nicholas Strotz. In listing these claims the bankrupt set forth the provisions of the trust pertaining to the prohibition against assignment, etc. (Tr. 10). The sole assets listed in the schedule are household goods of \$100, claimed as exempt, and an automobile valued at \$525 (Tr. 24, 25). An order of adjudication was entered October 23, 1940, and the matter referred to Ernest R. Utley, one of the Referees in Bankruptcy (Tr. 33).

On January 6, 1941, the bankrupt filed an amended schedule listing the claim of the RFC (Tr. 34). The total amount of unsecured claims filed was \$974,848.64. One

claim in the amount of \$245,811.25 was disallowed, reducing the amount of the claims to \$729,037.39 (Tr. 118). Included in this amount was the claim of the RFC in the sum of \$340,566.45 (Tr. 170). The RFC contested another claim of Eugenia Vollintine, a divorced wife of the bankrupt, for \$168,410.85 on the ground that it was barred by the Statute of Limitations (Tr. 170). This claim was allowed by the District Judge in the order appealed from.

On March 19, 1941, the RFC filed its specifications of objections to the discharge of the bankrupt (Tr. 63), wherein it was charged (a) that the bankrupt failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained, and (b) that the bankrupt at a time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy concealed his property with intent to hinder, delay or defraud his creditors.

After the objections to his discharge were filed, the bankrupt on April 30, 1941, filed a petition for arrangement under Chapter XI, sec. 321 (Tr. 37), wherein he proposed (Tr. 42) to pay to his trustee in bankruptcy for the benefit of his creditors the sum of \$10,000 cash and in addition execute any necessary writing by the terms of which he would assign to his creditors ten per cent of the right, title or interest which he may have as a beneficiary under the trust created by his father's estate, calling attention to the provisions of the "spendthrift clause" pertaining to the prohibition against assignment. Objections were filed to this plan by the RFC and other creditors: whereupon the bankrupt filed an amended petition for arrangement (Tr. 44) increasing the amount of cash to be paid to the trustee from \$10,000 to \$25,000 (Tr. 49). Objections were filed to the amended plan by the RFC and other creditors. On May 27, 1942, the bankrupt filed a second

amendment to his petition for arrangement (Tr. 51) increasing the amount of cash to be paid to his trustee from \$25,000 to \$32,000 (Tr. 53). This amendment stated that creditors whose claims aggregated \$324,341.37 had accepted the plan; that the RFC upon its claim of \$340,566.44 and the Continental Illinois Bank of Chicago upon its claim of \$32,055.70 had not accepted the plan (Tr. 52).

The matter came on to be heard before Referee Utley upon the objections filed by the RFC and other creditors (Tr. 68) to the discharge and amended petition for arrangement (Tr. 70). By stipulation of the parties the matter was submitted to Referee Utley upon the examination previously had before him under Section 21a of the Bankruptcy Act and upon the trustee's petition against one F. J. Ward to set aside various transfers (Tr. 114).

The specifications of the bankrupt's discharge filed by the RFC and relied upon in the District Court were as follows:

1. That the bankrupt subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy transferred and concealed his property with intent to hinder, delay or defraud his creditors by the following:

- (a) During said period he maintained a bank account in the name of F. J. Ward at the Security-First National Bank, Los Angeles, California, with intent to hinder, defraud and delay his creditors (Tr. 64).

- (b) That the bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of \$11,500 which he withdrew from the bank account of the estate of Anne Gould Strotz, a deceased wife, and that as executor of the estate he failed to file an inventory or appraisement in the estate of said decedent pending in the Superior Court of Los Angeles County, for the purpose of con-

cealing from his creditors the fact that there were assets in said estate and the fact that his interest in said estate was of some value (Tr. 66).

2. That the bankrupt destroyed, mutilated, concealed and failed to keep or preserve books of account or records from which the financial condition and business transactions of the bankrupt might be ascertained (Tr. 63).

The Ward Bank Account.

The bankrupt upon his examination before the Referee admitted that from December 13, 1938, to August 30, 1940, he maintained a bank account in the name of F. J. Ward at the Security-First National Bank at Los Angeles, California. The record contains a signature card dated December 7, 1938, at the Security Bank whereby Ward gave power of attorney to the bankrupt to sign checks, etc., on the account maintained in the name of Ward (Tr. 195). The record also contains the bank record showing deposits and withdrawals made by the bankrupt from this account from December 13, 1938, to August 30, 1940 (Tr. 196-203). This record shows that during said period he made 66 deposits aggregating \$26,260.16 and drew 308 checks aggregating \$26,260.16, and that within the period of twelve months immediately preceding the filing of the petition in bankruptcy he made 34 deposits in the account aggregating \$16,910.77 and issued 183 checks against the account aggregating \$17,341.30.

The bankrupt testified that the reason that he maintained this account in the name of Ward was that he was continually "harassed by sheriff's orders"; that he had been so harassed since 1930; that he used the Ward account as a banking account (Tr. 193); that his bank account had been attached prior to 1930 and that was the reason he carried the account thereafter in the name of

Ward (Tr. 194). Ward testified that Strotz told him "there was a possibility of certain moneys of his being attached and he asked me if I would object to having that account and I said no" (Tr. 194).

In 1939, a suit was filed against Strotz by one of the creditors (whose claim was subsequently allowed in the bankruptcy proceedings) in the Superior Court of Los Angeles County. Upon application made by this creditor on August 21, 1940, that Court issued an injunction pendente lite restraining the bankrupt from transferring his property, and a rule to show cause issued returnable August 30, 1940 (Tr. 204, 205). The bankrupt in response to the rule filed an affidavit wherein he stated that he had no account at the Security-First National Bank of Los Angeles at the time of the service of the order to show cause (Tr. 204, 205). On August 21, 1940, the date the restraining order was issued, the bankrupt had on deposit at the bank in the Ward account \$558.94. The account remained active until August 30, 1940, the date of the return of the rule, and between August 21, 1940, and August 30, 1940, he made deposits in the amount of \$2793.06 and withdrawals in the amount of \$3052.00 (Tr. 203).

During the hearing Referee Utley stated that the testimony impressed him that Strotz used the Ward bank account "for the purpose of keeping funds away from Mr. Strotz's creditors" (Tr. 212); that "Strotz wanted to do something to prevent creditors from reaching his money" (Tr. 213); that Strotz testified "in substance that he put this money where it could not be attached" (Tr. 213); that "any other construction of his testimony in that regard would certainly be a very, very strange construction" (Tr. 214).

Concealment of \$11,500 Inherited from Estate of Anne Gould Strotz, Deceased.

Anne Gould Strotz, second wife of the bankrupt, died September 13, 1938. The bankrupt was appointed executor of her estate by the Probate Court of Los Angeles County (Tr. 206). The bankrupt was a residuary legatee. From the latter part of 1939 until March, 1940, he received approximately \$18,000 from the estate (Tr. 206). No inventory or appraisement was filed until March 12, 1940. The inventory and appraisement that was filed originally bore date of March 12, 1938. The year of 1938 was stricken and 1940 written in (Tr. 208).

In February, 1940, Strotz issued a check on the estate account payable to himself individually for \$11,500 (Tr. 209-210). He testified he "drew it out because I will admit I was afraid my bank account might be attached in some form or other" (Tr. 210). In exchange for the \$11,500 check he secured cashier's checks dated February 26, 1940, as follows: Check No. 777,205 for \$3,600 payable to Harold C. Strotz. Check No. 777,207 for \$1,500 payable to Harold C. Strotz. Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt, for \$3,000. Check No. 777,201 payable to Bekins Van & Storage Company for \$600. Check No. 777,202 payable to Guy M. Peters for \$500. Check No. 777,203 payable to Hamilton Vose, Junior for \$500. These checks total \$9,700. He did not remember whether he received the balance of \$11,500 in cash. Check No. 777,205 for \$3,600 was cashed by him March 1, 1940. With respect to the check issued to his brother, Sidney M. Strotz, for \$3,000, he received in exchange the personal check of his brother for \$3,000 which he deposited in the Ward bank account (Tr. 211). Referee Utley, at the time this testimony was received, stated, "If Mr. Strotz had had the protection of his creditors in mind

he would have had some of the \$11,500 he got from his wife's estate to have gone toward the payment of some of them'' (Tr. 213).

Failure to Keep Books and Destruction of Records.

The bankrupt testified he had no books and records; that each month he destroyed the canceled checks of the bank account at the Security-First National Bank which he carried in the name of Ward (Tr. 192).

On August 7, 1942, Referee Utley issued his memorandum of decision (Tr. 75-83) upon the objections to the discharge and amended plan of arrangement offered by the bankrupt. The Referee in this opinion stated that with the exception of the RFC all the other creditors had recommended the plan; that the RFC had co-signers on the obligation against the bankrupt, one being the estate of John T. Cunningham, deceased, which is financially responsible and will be compelled to pay the claim of the RFC in full whether it receives a dividend from this bankrupt estate or not (Tr. 81). (This statement was entirely unsupported by the record.) The Referee concluded that the RFC would not be damaged in any way by the approval of the plan (Tr. 82); that if the discharge of the bankrupt was denied it would penalize creditors far more than it would the bankrupt; that the evidence did not "establish a clear and convincing case of fraud and concealment of assets as contemplated by Section 14-e of the Bankruptcy Act," and concluded that the objections to the bankrupt's discharge be overruled and discharge granted to the bankrupt (Tr. 82). The Referee also overruled the objections of the RFC to the claim of Eugenia Vollintine, the first wife of the bankrupt, based on the ground that it was barred by the statute of

limitations, the Referee holding that the Illinois statute of limitations of ten years was applicable and not the California four-year statute (Tr. 83). He thereupon directed that the objections to the plan of arrangement be overruled and same be confirmed (Tr. 83).

The formal order and findings of the Referee were not entered until December 2, 1942 (Tr. 116-128). The Referee in this order found that the estate of John T. Cunningham, the co-obligor with the bankrupt upon the obligation of the RFC, was insolvent; that the Cunningham estate was contesting the claim of the RFC against it in the Illinois courts and disclaimed liability thereon (Tr. 125-126).

On December 2, 1942, the same day on which the order of denial of discharge and approval of plan was entered by Referee Utley, he sent a letter to counsel for the RFC from which it appears that his attention was directed to the decision of this Court in the case of *Averill v. Quittner*, 131 Fed. (2d) 312, holding that the bankrupt has the burden of proving that he has not concealed his property upon the production of evidence to the contrary by objecting creditors. In this letter Referee Utley stated:

“From a strictly technical point of view, upon the cold question of whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered, I think your contention would be correct. However, I cannot bring myself to the point, under the facts in this case, of saying that the bankrupt is not entitled to a discharge when it would mean, in effect, that I would literally pitch into the fire \$32,000.00, which all creditors except the Reconstruction Finance Corporation, have expressed a desire to have and which they would not get if his discharge were denied. I feel that such an order would be of greater punishment to the creditors than to the bankrupt and would be a far greater detriment to them. Possibly this position forces me to require stricter

proof upon the question of discharge in so far as the objector is concerned, than I would otherwise require but if creditors are to be denied the right to the funds in question, under the circumstances of the case, I much prefer that a higher court makes such an order.” (Tr. 216-217.)

The RFC filed its petition to review the orders entered December 2, 1942, by Referee Utley granting the bankrupt's discharge, approving the plan of arrangement, and allowing the Vollintine claim (Tr. 130-162). The matter came on to be heard before the Honorable Paul J. McCormick, United States District Judge, who held that the Referee erred in holding that the ten-year statute of Illinois was applicable to the Vollintine claim and re-referred the matter to Referee Utley for further hearing. The District Judge in this order did not pass upon the question of discharge or approval of the plan (Tr. 163-169). The matter then came on for further hearing before Referee Laugharn in the absence of Referee Utley. Upon this hearing the bankrupt testified that he had been absent from the State of California during various periods and actually resided in the State of California for a total of less than four years. Referee Laugharn upon this evidence recommended the allowance of the claim of Eugenia Vollintine. The matter then again came on for hearing before the Honorable Paul J. McCormick, District Judge, who on June 28, 1944, entered an order allowing the Vollintine claim, denying the bankrupt's discharge, and disapproving the plan (Tr. 245-248). This is the order involved in the present appeal.

Appellant did not bring the entire transcript of evidence to this Court upon the present appeal but merely included pertinent portions of the transcript submitted by each side to the District Judge (Tr. 192-217, Tr. 234-244). A stipulation was entered into that these portions of the transcript “be relied upon in this appeal as the pertinent testimony”

(Tr. 256). However, at page 4 of appellant's brief a statement is made (unsupported by the transcript) to the effect that Judge McCormick announced that he "would not have sufficient time to read the entire reporter's transcript of the evidence in the proceedings and requested that each side submit the portions of the reporter's transcript which he or it believed would be in support of the briefs filed." We deem this statement misleading and unfair to Judge McCormick. This matter was before Judge McCormick twice upon the petition of the RFC to review Referee's order of December 2, 1942. In his first opinion rendered prior to the submission of the memoranda in question, Judge McCormick said he examined "the voluminous record before" him (Tr. 169). In his second opinion he stated, "The record before us is voluminous, both as to evidential matter and legal memoranda. We have considered it with care" (Tr. 245). We are content to rest our case upon the portions of the evidence as shown by the printed transcript. However, in view of the contention made by appellant that Referee Utley was in a better position to determine the facts, we wish to call attention to the fact that Judge McCormick had before him and considered all of the evidence heard by the Referee.

ARGUMENT.

The instant case revolves solely upon a factual question. The only testimony in the case is that of the bankrupt himself and of F. J. Ward examined by the Trustee in Bankruptcy, and on this testimony we rest our case completely. The only documentary evidence consists of a statement of the bank account maintained by the bankrupt in the name of Ward at the Security-First National Bank of Los Angeles (Tr. Ex. 2, Tr. 195-203). Upon this evidence, oral and documentary, we base our contention that the bankrupt concealed assets, to-wit, the bank account maintained in the name of F. J. Ward and his interest in the estate of his deceased wife, Anne Gould Strotz, by withholding the filing of an inventory in the estate until after he had withdrawn, as residuary legatee, the funds of the estate, and that the District Judge did not err in denying the bankrupt's discharge and disapproving the plan of arrangement submitted by him.

I.

The Ward Bank Account.

The facts concerning the bank account maintained by the bankrupt in the name of Ward are fully set forth in our statement of facts. At page 10 of appellant's brief it is contended that the bank account was not used as a secret depository because the bankrupt "wrote hundreds of checks which were issued by him to merchants throughout the entire county of Los Angeles and elsewhere."

The facts in this respect are almost identical with those in the case of *In Re Manasses*, 125 Fed. (2d) 647 (C. C. A.

7th Cir.) In that case the bankrupt maintained a bank account in the name of his wife. It appears from the opinion that he had a power of attorney from his wife identical with that of the bankrupt in this case (Tr. 195) under which he had the right to sign checks and deposit and withdraw funds, and over a period of three years signed checks in connection with the operation of his business upon this bank account. The Court in that case denied the bankrupt's discharge and held that the account "was maintained for the purpose of placing the money of the bankrupt beyond the reach of his creditors." In the case at bar, both the bankrupt (Tr. 193, 194) and Ward (Tr. 194) testified that the account was maintained for the purpose of preventing the funds from being attached.

At page 11 of appellant's brief the statement is made:

"that one of the purposes of the F. J. Ward account was to prevent his 'former wife' (*not a creditor in this proceeding*), from attaching his moneys."

The record does not support this statement that the "former wife" was not a creditor in this proceeding. It appears from page 5 of appellant's brief that from 1936 until the time of her death in September, 1938, bankrupt was married to Anne Gould Strotz, Eugenia Vollintine, whose claim was contested by the RFC, was a former wife of the bankrupt. It appears from the petition for arrangement of the bankrupt that the claim of this former wife in the sum of \$168,410.85 "is of long standing and represents moneys due by the terms of a property settlement agreement" (Tr. 39). It was the allowance of this claim that enabled the bankrupt to secure the necessary percentage of claims in order to have his plan approved. Referee Utley, when this contention was presented to him, stated, "from the testimony I have heard is I am impressed with this, that Mr. Strotz was not worried about his wife attaching him one-half as much as he was about someone else attaching" (Tr. 213).

At page 11 of appellant's brief it is contended that the bankrupt maintained the Ward bank account to "better aid him in rehabilitating himself in some form of business without being embarrassed or harassed." There is no evidence in the record to support this statement.

Here is how Harold C. Strotz, the bankrupt, tried to rehabilitate himself as shown by the record.

In a period of less than two years (Dec. 13, 1938, to Aug. 30, 1940) he deposited and withdrew in the Ward bank account (Exhibit 2, Tr. 196-203).....	\$26,260.16	
He withdrew from the estate of his wife (Tr. 206)	18,000.00	
		<hr/>
Total	\$44,260.16	
Paid to creditors (Tr. 211):		
Guy M. Peters (his Chicago lawyer)	\$500.00	
Bekins Van and Storage Company	600.00	
Hamilton Vose, Jr.....	500.00	1,600.00
		<hr/>
Unaccounted for	\$42,660.16	
(Except that \$2000 was spent for a pleasure trip to Honolulu, Tr. 210).		

The Referee did not find that the bankrupt was trying to rehabilitate himself. Referee Utley did, however, express himself upon this subject during the hearing. He stated:

"If he did put this money in the bank so he could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carried the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it.
* * * If there has been any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got

money, so there is no preferring one creditor over another. They have been all very much in the same class, they have not gotten anything, as far as the testimony is concerned. (Tr. 214) * * * That argument is silly, when he owes two million and when the evidence itself discloses he did not pay one cent to creditors." (Tr. 215)

At page 11 of appellant's brief the further statement appears that the bankrupt at no time "failed to disclose the existence of the F. J. Ward bank account." The record shows that on September 6, 1939, Martin T. O'Brien filed a suit against the bankrupt in the Superior Court of Los Angeles County (Tr. 23). A restraining order was issued against the bankrupt in that proceeding on August 21, 1940, enjoining the conveying or encumbering of property of the bankrupt (Tr. 204-205). That the bankrupt filed an affidavit in that proceeding that he had no account at the Security-First National Bank of Los Angeles (Tr. 205). That from the time the injunction was issued until August 30, 1940, the date the account was closed, withdrawals in the amount of \$3052 were made by the bankrupt from the account (Tr. 203).

Judge McCormick properly held that it was established by the admissions of the bankrupt and uncontradicted evidence in the case, the Ward Bank Account was "an obvious instrument of concealment" (Tr. 247).

II.

Concealment of Funds Inherited from Estate of Anne Gould Strotz, Deceased.

The record shows that the bankrupt, as executor of his wife's estate, withheld filing of an inventory for a period of approximately two years (Tr. 206). The bankrupt's only explanation was "I never knew I was supposed to

file one" (Tr. 209). The inventory was filed in March, 1940 (Tr. 209). Shortly before the inventory was filed, in February, 1940, the bankrupt drew a check payable to his order upon the estate account for \$11,500 as part of his distributive share as residuary legatee of the estate (Tr. 209, 210, 211). With respect to this withdrawal the bankrupt testified that he exchanged the \$11,500 check for the following cashier's checks dated February 26, 1940:

"Check No. 777,205 for \$3,600 payable to Harold C. Strotz.

Check No. 777,207 for \$1,500.00 payable to Harold C. Strotz.

Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt, for \$3,000.00.

Check No. 777,201 payable to Bekins Van & Storage Company for \$600.00.

Check No. 777,202 payable to Guy M. Peters for \$500.00.

Check No. 777,203 payable to Hamilton Vose, Junior, for \$500.00.

These checks total \$9,700.00. I don't remember whether I received the balance of the \$11,500.00 in cash. The check No. 777,205 for \$3,600.00 was cashed by me March 1, 1940.

With reference to the check made out to my brother, Sidney M. Strotz, for \$3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for \$3,000.00 drawn on the First National Bank of Chicago." (Tr. 211)

It is argued by appellant (p. 12) that the distributed moneys from the bankrupt to himself as residuary beneficiary without an order of court "does not warrant the deduction that he thereby concealed, hindered or delayed his creditors." This statement so far as it goes may be correct were it not for the fact that the bankrupt admitted that he withdrew the \$11,500 in this manner because "I will admit I was afraid my bank account might be attached

in some form or other'' (Tr. 210). No better evidence could have been adduced of the intent to conceal his interest in this estate than his own admissions.

III.

Section 14-c (4) of the Bankruptcy Act Does Not Make It a Prerequisite That During the Period of Concealment There Should Be a Judgment Creditor Entitled to Execution in the Jurisdiction in Which the Bankruptcy Proceeding Is Filed.

At page 16 the contention is made that because there was no judgment creditor in the State of California entitled to an execution during the period of one year immediately preceding the filing of the petition in bankruptcy, there could have been no concealment under this provision of the Bankruptcy Act. No authority is cited in support of appellant's contention in this respect, and to so hold would defeat the purpose, spirit and intent of the provisions of Section 14-c (4) of the Bankruptcy Act.

However, the record shows that on September 6, 1939, Martin T. O'Brien, a creditor, filed suit against the Bankrupt in the Superior Court of Los Angeles County. That in said action the plaintiff obtained a restraining order on August 21, 1940, restraining the bankrupt from transferring his property (Tr. 204, 205, 206). That after the issuance of the injunction he withdrew \$3052 from the Ward bank account (Tr. 203) and filed an affidavit in the O'Brien suit that he had no account at the Security-First National Bank of Los Angeles (Tr. 205).

IV.

The Evidence Showed That the Proposed Plan of Arrangement Was Not Made in Good Faith or for the Best Interest of Creditors.

At page 17 of appellant's brief the contention is made that there is no evidence in support of the finding of the lower court to the effect that the proposed plan of arrangement is not feasible.

The bankrupt *did not make an offer to his creditors until after objections to his discharge were filed*. He was not in any business, so that this is not a case of a bankrupt trying to reorganize a going business. He first offered \$10,000; that was rejected. He then offered \$25,000 which was rejected. The present offer, made nineteen months after the filing of the voluntary petition for adjudication, was \$32,000. This was a clear case of a bankrupt trying to bargain with his creditors and the Court for the purpose of buying his discharge. Before a plan of arrangement can be approved under the Bankruptcy Act it must appear:

1. That it is for the best interest of creditors.
2. That it is fair, equitable and feasible.
3. That the debtor has not been guilty of any acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt.
4. That the proposal be in good faith.

(Sec. 366 Bankruptcy Act.)

None of these requirements were met.

Upon the question of whether the plan is for the best interest of creditors it is difficult to perceive how the creditors are benefited by the acceptance of a nominal dividend out of the gross sum of \$32,000, from which the cost of administration must first be paid. The record discloses that if the bankrupt survives his mother he will

receive outright a third of a million dollars from his father's estate which, in the event of the Court's denying his discharge, would be subject to the claims of creditors. The amount of claims allowed was \$729,037.39. The offer of the bankrupt was to pay \$32,000 to his trustee. Costs of administration were to be deducted before distribution to creditors. Four per cent of \$729,037 is \$29,161. This is the maximum dividend the creditors would have received under the plan. The record in this case discloses that the plan is neither fair nor equitable.

The record likewise discloses that the bankrupt, by his own admissions, has committed acts which would bar his discharge. The proposal is not in good faith, as demonstrated by the fact that the first offer was not made until thirty days after the RFC had filed objections to his discharge, and the last offer was not made until more than nineteen months after the filing of the original voluntary petition for adjudication.

V.

When the Findings of a Referee in a Bankruptcy Matter Are Based Wholly Upon an Inference, Drawn from Uncontradicted Facts, and the Reasonableness of the Inference May Be as Fairly Determined by the Court as by the Referee, No Presumption in Favor of the Referee's Finding Exists Which Binds the Independent Judgment of the Court.

At page 18 of appellant's brief it is contended that this Court should not give the same weight to the findings of the District Judge as it does to those of the Referee. In support of this contention appellant relies upon *Wilson v. Hall*, 81 F. (2d) 918, and general order in bankruptcy 47, Section 11 U. S. C. A. *Wilson v. Hall*, 81 F. (2d) 918, does not support appellant's contention. In that case in con-

struing general order 47 the Court at page 919 said, "Where, as here, the Court rejects the finding of the referee, it is the finding of the Court and not that of the referee which is considered presumptively correct upon appeal."

The leading case upon this subject is *Stewart v. Ganey*, 116 F. (2d) 1010 (5th Cir.). That case, like this, involved the question of the bankrupt's discharge on the ground of concealment of assets. The District Court set aside the findings of the Referee. The gist of the court's opinion is that where the District Court's finding was supported by substantial evidence and was not clearly erroneous, its finding rather than that of the referee should be accepted by Circuit Court of Appeals on appeal.

In *Carr v. Southern Pac. Co.*, 128 Fed. (2d) 768 (C. C. A. 9th), this Court expressly adopted the views of the C. C. A. (5th Circuit) in *Stewart v. Ganey*, 116 F. (2d) 1010, 1012, upon this question.

Appellant argues at page 18 that the District Judge did not have the opportunities that the Referee had to hear the testimony of witnesses and thus determine their credibility, and, further, that "at best there was a conflict of evidence on the question of concealment." Judge McCormick in his decision stated that he, in arriving at his conclusion, "made proper allowance for the discretion and prerogative of the trier of facts in reviewing orders of the Referee" (Tr. 245). There was no conflict of evidence on the question of concealment. The concealment was established by the unqualified admissions of the bankrupt himself (Tr. 193, 194). That there was no question of concealment in the mind of the Referee further appears from the statements of Referee Utley during the course of the hearing as shown by the transcript of record (pp. 212-215).

It further appears that on November 30, 1942, the attorneys for the RFC called the Referee's attention to the

ruling of this Court in *Averill v. Quittner*, 131 Fed. (2d) 312, construing section 14-c of the Bankruptcy Act to the effect that where the objecting creditor shows to the satisfaction of the Court that there are reasonable grounds for believing the bankrupt has committed the act charged that then the burden of proving that he has not committed such act is upon the bankrupt (Tr. 216).

On December 2, 1942, concurrently with the decision and final order entered by the Referee, he sent a letter to counsel for the RFC in which he conceded that "upon the cold question of whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered" the contention of the RFC would be correct (Tr. 216-217). He further stated in this letter that he would refuse to "literally pitch into the fire \$32,000"; that because of this offer he had required the RFC to establish its objections by "strieter proof" than required by section 14-c of the Bankruptcy Act and the rule laid down by this Court in *Averill v. Quittner*, 131 Fed. (2d) 312.

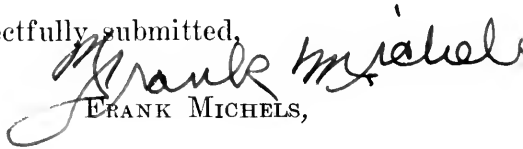
It is obvious from the record that Referee Utley had come to the conclusion from the undisputed facts in the record that the bankrupt had been guilty of an act of concealment sufficient to prevent his discharge in bankruptcy but held against the RFC to penalize it for refusing to accept the bankrupt's plan of arrangement.

Conclusion.

The purpose of a discharge in bankruptcy is to afford relief to honest debtors. The facts in this case, coming from the lips of the bankrupt, conclusively show that he was guilty of concealment of his assets. The bankrupt cannot dispute the facts. Instead he urges an interpretation based upon alleged proper motives which the facts

themselves belie. The order of the District Court sustaining the objections to the bankrupt's discharge and disapproving the plan of arrangement is correct and should be affirmed.

Respectfully submitted,


FRANK MICHELS,

JACOB J. LIEBERMAN,
*Attorneys for Reconstruction Finance
Corporation, Appellee.*

No. 10848

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES TOZZI, doing business as James Tozzi
& Co.,

Appellant,

vs.

EMIL BALLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

OCT 6 - 1944

PAUL P. O'BRIEN,
CLERK

No. 10848

United States
Circuit Court of Appeals
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JAMES TOZZI, doing business as James Tozzi
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Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before the Secretary of Agriculture
Agricultural Marketing Service
P. A. C. A. Docket No. 4010

EMIL BALLEY,

Complainant,

vs.

JAMES TOZZI, doing business as JAMES
TOZZI & CO.

Respondent.

COMPLAINT

Complainant above-named respectfully alleges:

I.

That the complainant is an individual, whose post office address is Merrill, Oregon.

II.

That the complainant is informed and believes that the respondent James Tozzi is an individual doing business as James Tozzi & Co., whose post office address is Stockton, California.

III.

That the respondent is licensed under the Perishable Agricultural Commodities Act of 1930 as a dealer, commission merchant, and/or broker.

IV.

That on or about the 26th day of March, 1940, in the course of interstate commerce, complainant

by oral contract contemplating the shipment of the commodity in interstate commerce, purchased from the respondent, by and through respondent's agent and servant William M. Streeter, 10,851 sacks, each of one hundred weight, of U. S. No. 1 size minimum varying potatoes, stored in a cold storage warehouse in Klamath Falls, Oregon, for the agreed price of \$1.45 per hundred weight or sack. [1*]

V.

That is was mutually agreed between the complainant and the respondent that the respondent should deliver to the complainant the said 10,851 sacks of potatoes f. o. b. Klamath Falls, Oregon, for the sum of \$15,733.95 payable as follows: \$2500.00 on or about April 1, 1940, and the balance sum of \$13,233.95 on or about April 6, 1940.

VI.

That pursuant to said oral agreement, the complainant, on or about the 29th day of March, 1940, paid to William M. Streeter, as agent for respondent, the sum of \$2500.00, represented by a check in said amount, drawn by the complainant on the Klamath Falls Branch of the First National Bank of Portland, Oregon, and made payable to respondent, which said check was thereafter endorsed "James Tozzi & Company," and collection of said amount made by respondent and accepted by respondent as part of the purchase price of said potatoes, a copy of said check being marked "Com-

*Page numbering appearing at foot of page of original certified Transcript of Record.

plainant's Exhibit 1;" that copies of the invoices for the sale of said potatoes are marked "Complainant's Exhibit 2."

VII.

That according to the terms of said oral agreement the balance of said purchase price was to be paid by complainant to respondent at a meeting between respondent's said agent and complainant on the 3rd day of April, 1940; that, in compliance with said understanding, complainant did call at the office of the respondent on said date when it was then agreed between complainant and respondent's said agent that they meet again on or about April 5, 1940, at the bank which held the warehouse receipts for said potatoes in order that said warehouse receipts could be delivered to the complainant upon the payment of the balance due on said purchase price. [2]

VIII.

That complainant and respondent's said agent did meet on April 6, 1940, in accordance with the previous understanding, and at said time and place complainant did offer respondent's said agent payment in full for the said potatoes, demanding at the time clear title to the said potatoes.

IX.

That respondent's said agent did then and there refuse to deliver clear title to said potatoes, demanding of the complainant that he assume the payment of the warehouse lien for storage on said potatoes, and did refuse the said offer of payment of the said balance due.

X.

That complainant did notify respondent of the failure of his said agent to perform the said agreement, and did demand that respondent perform said contract; that said respondent did fail, refuse and neglect to perform said agreement; that respondent has continued to retain the said down payment of \$2500.00 and has, on and prior to this date, sold the potatoes to third parties.

XI.

That at all times mentioned in this complaint, complainant was licensed as a dealer, commission merchant and broker in perishable agricultural commodities; that complainant did purchase said potatoes for the purpose of making a re-sale of same; that the price of potatoes of similar quality to those purchased by complainant from respondent f. o. b. Klamath Falls, Oregon, on or about April 6, 1940, varied from \$1.75 to \$2.00 per hundredweight, and that by reason of the breach of said contract by respondent complainant lost the difference between the said contract price of \$1.45 per hundredweight and the actual market value thereof, or 30c net per hundredweight, and [3] complainant was thereby damaged in the sum of \$3000.00.

XII.

That there is now due and owing complainant from respondent the following sums of money: \$2,500.00 down payment, bearing interest at the rate of 6% interest per annum from the 6th day of April, 1940, and \$3,000.00 as damages for the breach of said agreement.

XIII.

That the matters and actions set forth herein constitute a violation by respondent of Section 2 of the Perishable Agricultural Commodities Act of 1930.

XIV.

Complainant's exhibits, numbered 1 and 2, inclusive, are attached hereto as a part of this complaint.

Wherefore complainant prays that a copy of this complaint be served upon the above-named respondent and that he be required to answer the charges herein stated in writing within such time as the Secretary may require; that, upon the record made either with or without formal hearing, as provided in the Act or in the regulations, and by appropriate order, the complainant be awarded such amount of damages as he may be entitled to receive according to the facts established; and that the Secretary also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated at Klamath Falls, Oregon, this 26th day of April, 1941.

EMIL BALLEY

Complainant

WILSON S. WILEY and

G. Q. D'ALBINI,

Attorneys for Complainant.

608-9 Medical Dental Bldg.,
Klamath Falls, Oregon. [4]

State of Oregon,
County of Klamath—ss.

Emil Balley, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof, and that the same are true except as to matters therein stated on information and belief and as to such matters he believes them to be true, and that he is able to verify this complaint, being the complainant himself.

/s/ EMIL BALLEY

Subscribed and sworn to before me this 2nd day
of Mar. 1941.

(Seal) HARRY D. BROWN

Notary Public for Oregon.

My commission expires 9-24-41.

[Endorsed]: Rec'd May 5, 1941

Agricultural Marketing Service

U. S. Dept. of Agriculture [5]

COMPLAINANT'S EXHIBIT No. 1

Advance on 30 carload of potatoes @ \$1.45 per cwt.
potatoes U. S. No. 1, Size A.

Klamath Falls, Ore. April 1, 1940

Klamath Falls Branch 96-64

The First National Bank of Portland

Pay to James Tozzi & Co., or order \$2500.00 Twenty
Five Hundred & No./100.....Dollars

EMIL BALLEY

(Endorsements)

(1040) Pay to the order of (1040)

The First National Bank of Portland (Ore)

James Tozzi & Company

Pay to the order of

Any Bank, Banker or Trust Co

All prior endorsements guaranteed

Mar 30 1940

The First National Bank of Portland

96-198 Merrill Branch 96-198

40 Merrill Oregon 40

Pay Through Clearing House or pay to the order
of any bank, banker or trust company

April 1, 1940 0000

The First National Bank of Portland

Klamath Falls Branch 96-64

(Perforated note: "Paid 4;1,40 96-64" [6])

COMPLAINANT'S EXHIBIT No. 2

(30 separate invoices in this exhibit)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 14-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 15-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 16-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon
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Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 17-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon
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Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 18-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 19-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 20-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon
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Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 21-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage
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Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 22-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon
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Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

[8]

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 23-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon
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Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 24-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 25-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 26-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 27-I
All quotations sub- iect to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 28-I
All quotations sub-	Klamath Branch	Car
ject to confirmation		From.....
Hay Potatoes Grain		
P.O. Box 626—Malin, Oregon		
Sold to Emil Balley	Shipped to	
Merrill, Oregon	Klamath Ice and Cold Storage	
	Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 29-I
All quotations sub-	Klamath Branch	Car
ject to confirmation		From.....
Hay Potatoes Grain		
P.O. Box 626—Malin, Oregon		
Sold to Emil Balley	Shipped to	
Merrill, Oregon	Klamath Ice and Cold Storage	
	Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 30-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 31-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Malin brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 32-I
All quotations sub-	Klamath Branch	Car
ject to confirmation		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley	Shipped to	
Merrill, Oregon	Klamath Ice and Cold Storage	
	Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

[10]

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 33-I
All quotations sub-	Klamath Branch	Car
ject to confirmation		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley	Shipped to	
Merrill, Oregon	Klamath Ice and Cold Storage	
	Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 34-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 35-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 36-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice & Cold Storage Warehouse— Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 37-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 38-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal & Malin brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & Co.	File 39-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 40-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldscal brand russets fob	1.45	522.00

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 41-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....
	Hay Potatoes Grain	
	P.O. Box 626—Malin, Oregon	
Sold to Emil Balley Merrill, Oregon	Shipped to Klamath Ice and Cold Storage Klamath Falls, Oregon	

Quantity	Description	Price	Total
360	100 lb US ONE Goldscal brand russets fob	1.45	522.00

Complainant's Exhibit No. 2—(Continued)

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 42-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....

Hay Potatoes Grain

P.O. Box 626—Malin, Oregon

Sold to Emil Balley	Shipped to
Merrill, Oregon	Klamath Ice and Cold Storage
	Klamath Falls, Oregon

Quantity	Description	Price	Total
360	100 lb US ONE Goldseal brand russets fob	1.45	522.00

[12]

Bus. Phone 2501	Invoice	Date 4/1/40
Res. Phone 1332	JAMES TOZZI & CO.	File 43-I
All quotations sub- ject to confirmation	Klamath Branch	Car
		From.....

Hay Potatoes Grain

P.O. Box 626—Malin, Oregon

Sold to Emil Balley	Shipped to
Merrill, Oregon	in Klamath Ice and Cold Storage
	warehouse—Klamath Falls, Oregon

Quantity	Description	Price	Total
411	100 lb US ONE Goldseal brand russets fob	1.45	595.95

[13]

State of Oregon,
County of Klamath—ss.

I, the undersigned, one of the attorneys for the complainant, do hereby certify that I have prepared the foregoing copy of complaint, and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Klamath Falls, Oregon, dated this 26th day of April, 1941.

WILSON S. WILEY [14]

ANSWER TO COMPLAINT

Comes Now James Tozzi, doing business as James Tozzi & Company, and in answer to the said Complaint, admits, denies and alleges as follows:

I.

Admits Paragraph One of said Complaint.

II.

Admits Paragraph Two of said Complaint.

III.

Admits Paragraph Three of said Complaint.

IV.

Admits Paragraph Four of said Complaint except as limited herein, to wit: In this connection respondent alleges that the agreed price of the potatoes so sold was One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges.

V.

Admits the allegations of Paragraph Five of said Complaint except as modified herein, to wit: Respondent alleges that the agreed and total purchase price was Fifteen Thousand Seven Hundred Thirty-three and 95/100 (\$15,733.95) Dollars plus accrued storage charges. Respondent alleges that if said sum of money had been paid to him, he would have delivered said potatoes unto said Complainant.

VI.

Denies the allegations of Paragraph Six of said Complaint except as herein admitted and in this connection respondent further alleges that Complainant in pursuance with the oral agreement to purchase said potatoes for the sum of One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges, did pay to and there was received by Respondent on or about April 1, 1940, the sum of Twenty-Five Hundred (\$2500.00) Dollars.

VII.

Admits the allegations of Paragraph Seven except as herein modified and in this connection Respondent alleges that the oral agreement for the [15] purchase and sale of said potatoes was for the purchase price of One and 45/100 (\$1.45) Dollars per hundredweight plus accrued storage charges.

VIII.

Denies each and every allegation of Paragraph Eight of said Complaint except as admitted herein

and in this connection Respondent alleges that Complainant and Respondent did meet on April 6, 1940, pursuant to agreement. Respondent denies that Complainant at that time had in his possession and was ready, willing and able to pay either the sum of Thirteen Thousand Two Hundred Thirty-Three and 95/100 (\$13,233.95) Dollars or the total purchase price as claimed by Respondent, which is the last named sum plus accrued storage charges. Respondent is informed and believes and thereupon alleges that at no time during the progress of this transaction was Complainant in a position financially to carry through with his agreement to purchase and pay for said potatoes.

IX.

Denies each and every allegation of Paragraph Nine of said Complaint.

X.

Admits the allegations of Paragraph Ten of said Complaint that Complainant did personally communicate with Respondent at his office in Stockton, California, in which communication he claimed that one Streeter as agent of Respondent had quoted to him these potatoes for the sum of One and 40/100 (\$1.40) Dollars per hundredweight plus accrued storage charges. That he, Complainant, was unable or unwilling to carry through with said contemplated purchase and sale of said potatoes and abandoned the same. That later he again contacted the agent of Respondent and was then given

a quotation of One and 45/100 (\$1.45) Dollars per hundredweight and, as Complainant stated, that this second quotation said nothing with respect to the payment of the accrued storage. That Complainant stated that his interpretation of the second quotation was that whereas the price under the first quotation was One and 40/100 (\$1.40) Dollars per hundredweight plus accrued storage, that the second quotation was only One and 45/100 (\$1.45) Dollars because the said agent did not mention the question of storage. Respondent states that in writing he notified Complainant that if the latter would pay in cash the balance of the purchase price in accordance [16] with his contention, to wit Thirteen Thousand Two Hundred Thirty-three and 95/100 (\$13,233.95) Dollars as computed upon a straight price of One and 45/100 (\$1.45) Dollars per hundredweight without storage, that the question of whether or not the alleged quotation made to him by the said agent Streeter included storage as an additional part of the purchase price should be submitted to arbitration.

Respondent further alleges that Complainant did not reply to this offer of respondent and at no time since April 1, 1940, has Complainant ever offered the aforesaid sum of Thirteen Thousand Two Hundred Thirty-three and 95/100 (\$13,233.95) Dollars or any other sum of money as the balance remaining unpaid upon said potatoes, and further that Complainant at no time has ever offered or agreed to pay any portion of the accrued storage upon said potatoes.

XI.

Denies each and every allegation in Paragraph Eleven of said Complaint.

XII.

Denies the allegations contained in Paragraph Twelve of said Complaint except as admitted herein: In this connection Respondent alleges that he in fact did receive Twenty-Five Hundred (\$2500.00) Dollars as a down payment on or about April 1, 1940, as upon the purchase price of said potatoes under an oral agreement to buy and sell the same as he, said Respondent, has alleged herein. He further alleges that Complainant has refused and failed to carry out the agreement for the purchase of said potatoes and by reason thereof the said respondent has been damaged in the sum far in excess of the aforesaid Twenty-Five Hundred (\$2500.00) Dollars which he has received from said Complainant. That by reason thereof he, the said Respondent, is not indebted unto the said Complainant in any sum of money whatsoever.

XIII.

Denies each and every allegation in Paragraph Thirteen of said Complaint.

Wherefore, Respondent prays that Complainant take nothing and that [17] he, Respondent, be awarded his costs of suit herein and whatever other and further relief as the Secretary of Agriculture may deem meet and proper in the premises.

Dated: July 3, 1941. Stockton, California.

JAMES TOZZI

Respondent

SMALLPAGE and MACOMBER

Attorneys for Respondent.

Savings and Loan Building,
Stockton, California. [18]

State of California,

County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the Respondent in the above-entitled action; that he has read the foregoing Answer to Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to such matters he believes it to be true.

JAMES TOZZI

Subscribed and sworn to before me this 3rd day of July, 1941.

(Seal)

FORREST E. MACOMBER

Notary Public in and for the County of San Joaquin, State of California. [19]

AMENDMENT TO ANSWER TO COMPLAINT

Comes now the above named Respondent and makes and files this, his first amendment to his answer to said Complaint, alleging, admitting and denying as follows:

I.

Alleges that the Complainant has no legal capacity to sue or bring this proceeding in that Respondent is informed and believes and thereupon alleges that at the time of the initiation of this proceeding Complainant was a minor and by reason thereof the said Complainant must be represented in any legal proceeding by a guardian, duly appointed, qualified and acting therefor. That any judgment rendered either against or for the said Complainant would not be binding upon either the Complainant or the Respondent.

II.

And for a further answer unto said Complaint, Respondent alleges that on or about May, 1940, the cause of action set forth in said complaint was duly settled and discharged between Respondent and Complainant by the making of a new contract between them wherein and whereby the said Complainant waived the alleged cause of action against this Respondent and agreed that he would accept a division of profits that might be realized from what is known as the "Tule Lake-Streeter" contracts, said contracts originating in and around the Tule Lake section, covering specifically growers named McFall, Brown and Williams.

JAMES TOZZI

Respondent [22]

State of California,
County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the Respondent in the above-entitled action; that he has read the foregoing Amendment to Answer to Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to such matters he believes it to be true.

JAMES TOZZI

Subscribed and sworn to before me this 17th day of March, 1942.

[Seal] LAFAYETTE J. SMALLPAGE
Notary Public in and for the County of San Joaquin, State of California. [23]

PROCEEDINGS, FINDINGS OF FACT,
CONCLUSIONS, AND ORDER

PROCEEDINGS

The complainant, Emil Balley, an individual of Merrill, Oregon, filed an informal complaint on April 13, 1940, and a formal complaint on May 5, 1941, in this proceeding, under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 1940 ed, 499a et seq.), alleging that the respondent James Tozzi & Company, of Stockton, California, has breached the contract entered into in the course of interstate commerce between the complainant and

the respondent, in that the respondent has failed, neglected, and refused to deliver to the complainant 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon.

It is alleged by the complainant that during March, 1940, by oral contract, the respondent agreed to sell to the complainant 10,851 sacks of U. S. No. 1 potatoes at the agreed price of \$1.45 per cwt. The complainant further alleges that by mutual agreement the respondent was to deliver to the complainant the 10,851 sacks of potatoes for the total f.o.b. sum of \$15,733.95, payable \$2,500 on or about April 1, 1940, and the balance of \$13,233.95 to be paid by the complainant to the respondent on or about April 1, 1940. The complainant claims that the sum of \$2,500 was paid to the respondent's agent, William M. Streeter, on or about March 29, 1940, it being agreed by and between the parties that at a subsequent date the parties would meet for the purpose of paying and receiving the balance of the contract price. It is further claimed that the complainant and the respondent's agent, William M. Streeter, met on April 6, 1940, in accordance with a previous understanding and that at the time the complainant offered to pay the respondent's agent in full for the potatoes in exchange for a clear title to the produce. The respondent's agent, it is stated by the complainant, refused to deliver clear title to the produce, demanding that the complainant assume payment of the storage thereon and that thereafter the respondent failed to deliver any of the potatoes and that by reason of the respondent's

breach of contract the complainant suffered damages in the amount of \$2,500, representing the advance payment, together with interest thereon, plus an amount of \$3,000 which the complainant claims as damages [24] sustained because of the breach of contract. The complainant claims damages, therefore, in the total sum of \$5,500 plus interest.

The respondent admits the existence of a contract but claims that the price agreed upon was \$1.45 per cwt., plus accrued storage charges. Respondent states that the total agreed purchase price was \$15,733.95, plus accrued storage charges, and states that if said sum of money had been paid the potatoes would have been delivered to the complainant. The respondent admits receipt of the sum of \$2,500 from the complainant but claims that the complainant refused and failed to carry out the agreement entered into and by reason thereof the respondent has been damaged in a sum far in excess of the amount of \$2,500, admittedly received from the complainant. By reason of this, the respondent denies indebtedness to the complainant in any amount whatsoever.

The main issue in this case is the actual terms of the contract with respect to the price agreed upon. The complainant claims that the price was \$1.45 per cwt., f.o.b., free of any and all storage charges. The respondent claims that the price agreed upon was \$1.45 per cwt., f.o.b., plus accrued storage charges. In addition to this issue is the question of damages. The complainant seeks to recover, in addition to the \$2,500, an advance payment made, dam-

ages in the amount of \$3,000, representing prospective or anticipated profits. The respondent admits receipt of the sum of \$2,500 from the complainant but claims that it was damaged far in excess of the sum received from the complainant because of the failure of the complainant to fulfill his part of the contract.

A hearing was held on March 18, 1942, at Stockton, California. Wilson S. Wiley, and G. Q. D'Albini, appeared for the complainant, and Lafayette J. Smallpage, and Forrest E. Macomber, appeared for the respondent. On March 18, 1942, before the Examiner, the respondent filed an amended answer to the complaint, in which he set forth the further defenses that the complainant because he was a minor had no legal capacity to sue or bring this proceeding and that in May 1940, the complainant entered into a new contract with the respondent by agreeing to accept a division of profits that might be realized from future contracts of sale of said potatoes, which the respondent [25] had under contract with growers, in satisfaction of whatever rights or moneys were due him under the former contract.

At the time of filing the amended answer to the complaint the respondent also made and filed a motion to dismiss the proceedings on the ground that the complainant is, and was, a minor without capacity to sue. This motion was later denied and the complainant required to appear by guardian ad litem.

The record shows that there was no written contract signed by either the complainant or the respondent in any of their negotiations. There was, however, placed in evidence by the complainant a cancelled check dated April 1, 1940, payable to the order of James Tozzi & Company, in the amount of \$2,500, which check was paid by the First National Bank of Portland, Oregon, for the account of James Tozzi & Company. The face of the check carries this notation in the handwriting of Emil Balley, "Advance on 30 carloads of potatoes at \$1.45 per cwt. potatoes grade U. S. No. 1, Size A." The complainant introduced 30 invoices of James Tozzi & Company issued in connection with the transaction under consideration. These invoices showed the shipping point as Klamath Falls, Oregon, and the terms of the sale to Emil Balley as "100 lb. U. S. One Goldseal brand russets f.o.b. price \$1.45." The invoices contained no reference to storage charges.

The testimony and the record show that the respondent, subsequent to his failure to perform under his contract with the complainant, sold or disposed of the 10,851 sacks of potatoes, the subject matter of the contract, and received therefor, as net proceeds, \$18,205.51. This was an increase of \$2,471.56 over the amount the respondent would have received if the contract between the complainant and the respondent had not been breached.

FINDINGS OF FACT

1. The complainant, Emil Balley, is an individual whose post office address is Merrill, Oregon.

2. The respondent, James Tozzi & Company, is a sole proprietorship owned by James Tozzi, whose post office address is Stockton, California. The respondent was duly licensed under the Perishable Agricultural Commodities Act [26] 1930, during all of the times mentioned in the complaint.

3. On or about April 1, 1940, the complainant entered into a contract with the respondent in the course of interstate commerce, for the purchase of 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon, for the sum of \$15,733.95.

4. On or about April 1, 1940, the complainant paid to the respondent \$2,500 which sum was to be applied on the purchase price.

5. The sum of \$2,500 paid by the complainant to the respondent at the time of the consummation of the contract has never, nor has any part thereof, been repaid by the respondent to the complainant.

6. On or about April 6, 1940, the complainant tendered to the respondent a check in the amount of \$13,233.95, being the balance due under the contract, but the tender of the above-named sum was refused by the respondent.

7. The respondent failed and refused to deliver to the complainant the 10,851 sacks of potatoes, the subject matter of the contract, on or about April 6, 1940, and has continued to do so since that time.

8. Subsequent to the respondent's failure to per-

form under its contract with the complainant the respondent sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds, \$18,205.51. This was an increase of \$2,471.56 over the amount the respondent would have received had it not breached its contract with the complainant.

9. The cause of action arose on or about April 6, 1940, and an informal complaint was filed on April 13, 1940, which was within the nine months period allowed under the act for the filing of a claim for reparation.

CONCLUSIONS

The Circuit Court of the State of Oregon having appointed a guardian ad litem for the complainant, there remains no question as to his legal capacity as a minor to bring this action. It is further concluded that the evidence fails to show that the complainant agreed to pay the storage charges, and, therefore, when the respondent refused to deliver the 10,851 sacks of potatoes because the complainant would not do so, the respondent breached the contract [27] entered into between the parties. The evidence also fails to sustain the respondent's claim that a new contract was entered into. A novation is never presumed but must be established by the full discharge of the original debt, by the express terms of the agreement, or by actions of the parties whose intentions must be clear. *Henry v. Hubert*, 35 S. W. 444, 448 (Tenn.)

Since it is clear that the respondent has breached its contract with the complainant by failing to de-

liver to the complainant 10,851 sacks of potatoes, there only remains the question as to what amount the complainant has been damaged. As a general rule, profits which would have been realized by the purchaser if a contract had been performed may be recovered as damages for its breach, provided they are susceptible of being ascertained with reasonable certainty. *Avil Mining Company v. Humble*, 135 U. S. 540. The evidence in this case does not show with reasonable certainty the profits that the complainant would have realized had the respondent not breached the contract with the complainant. However, the evidence does show that the complainant did everything that he was required to do under the contract, namely, that he paid to the respondent \$2,500 as part payment of the purchase price and tendered to the respondent the balance of the said purchase price which the respondent refused to accept. Under these circumstances the complainant became the equitable owner of the potatoes, and the complainant may consider the respondent's resale of the potatoes as having been made for complainant's account. Therefore, the complainant is entitled to receive from the respondent any amount in excess of the contract price (\$15,733.95) received by the respondent in connection with the particular lot of potatoes. The respondent received \$2,500 from the complainant and \$18,205.51 from the purchaser on the resale, or a total of \$20,705.51 which represents receipts of \$4,971.56 in excess of the contract price. The complainant should, therefore, be awarded \$4,971.56 with interest, and the facts

and circumstances, as herein set forth, should be published.

ORDER

It Is Ordered that within 30 days from the date of this order the respondent, James Tozzi & Company, Stockton, California, shall pay to the [28] complainant, Emil Balley, Merrill, Oregon, as reparation, the sum of \$4,971.56, with interest thereon at the rate of 5 per cent per annum, from April 6, 1940, until paid.

It Is Further Ordered that the facts and circumstances, as herein set forth, shall be published.

It Is Further Ordered that copies hereof shall be served upon the parties and that, except as to payment of reparation and service upon the parties, this order shall become effective 20 days after its date.

Done at Washington, D. C., this 14th day of December, 1942.

Witness my hand and the seal of the Department of Agriculture.

(Seal)

THOMAS J. THOMAS

Assistant to the Secretary of
Agriculture

Rufe Edwards:: wmc

11 18 1942 [29]

PETITION ON APPEAL

Now comes the defendant above-named, James Tozzi, doing business as James Tozzi & Company, and files this, his Petition on Appeal from the Order, Proceedings, Findings of Fact and Conclusions of the Secretary of Agriculture, filed in the office of the Secretary of Agriculture in Washington, D. C., on December 14th, 1942, bearing proceeding number P.A.C.A. Docket No. 4010, and states as follows:

The plaintiff, Emil Balley an individual of Merrill, Oregon, filed an informal Complaint on April 13th, 1940, under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C.A. 499a et seq.) and thereafter on May 5th, 1941, filed a formal Complaint under said act alleging that the defendant James Tozzi, doing business as James Tozzi & Company of Stockton, California, had breached a certain contract made in the course of interstate commerce between plaintiff and defendant in that the defendant had failed, neglected and refused to deliver to the plaintiff, ten thousand eight hundred fifty-one (10,851) sacks of potatoes, f.o.b. Klamath Falls, Oregon. An Answer and an Amended Answer were filed, answering the complaint and a hearing was held on March 18th, 1942, before H. D. Dechant, Examiner, at Stockton, California.

The complaint alleged that in March, 1940, by oral contract, defendant agreed to sell plaintiff 10,851 sacks of U. S. No. 1 potatoes, then in storage at Klamath Falls, Oregon, at the agreed price

of \$1.45 per cwt., f.o.b. Klamath Falls, Oregon, the purchase price to be payable \$2500.00 on or about April 1st, 1940, and the balance of \$13,233.95 payable on or about April 6th, 1940. Plaintiff paid the sum of \$2500.00 to defendant's agent and the complaint alleges that defendant failed to deliver any of the potatoes and that by reason of the defendant's breach of contract the plaintiff Emil Balley suffered damage in the sum of \$2500.00 representing the advance payment, together with interest thereon, plus an amount of Three Thousand (\$3,000.00) Dollars, which the plaintiff Emil Balley claims as damages sustained because of the breach of contract.

The issues at the trial were: [30]

1. Was any contract in fact made between plaintiff Emil Balley and defendant James Tozzi, doing business as James Tozzi & Company.

2. If such a contract were made, was the purchase price for the potatoes fixed at \$1.45 per cwt. plus accrued storage charges, or was the price \$1.45 per cwt. clear of all storage charges?

3. If such a contract were made, and if the price of potatoes under said contract were \$1.45 per cwt. clear of storage charges, was plaintiff ready, able and willing to perform within the time limitations of his option of March 29th, 1940?

4. If such a contract were made and if plaintiff were ready, able and willing to perform within the time limitation, was there a novation of said contract?

5. If such a contract were made as alleged by the plaintiff and the same were breached by the defendant, what damage if any was shown by plaintiff to have been sustained by him as a result of the breach thereof by defendant?

6. If such a contract were made, was such a contract one within the Statute of Frauds?

At the time of the Hearing, testimony both oral and documentary was introduced in evidence by both parties. Thereafter and on December 14th, 1942, the Secretary of Agriculture made and filed his Findings of Fact, Conclusions and Order of Reparation; that said Order directs the defendant to pay to plaintiff Emil Balley as reparation the sum of Four Thousand Nine Hundred Seventy-One and 56/100 (\$4,971.56) Dollars with interest thereon at the rate of five (5) per cent per annum from April 6th, 1940.

The grounds upon which Petitioner James Tozzi, doing business as James Tozzi & Company, relies to defeat the right of plaintiff Emil Balley to recover the damages claimed are as follows:

1. That the Findings of Fact Numbered 3, 6 and 8 as set forth in the Proceedings, Findings of Fact, Conclusions and Order of the Secretary of Agriculture, filed in Washington, D. C., on December 14th, 1942, are not [31] supported by the evidence, particularly for the reason that the evidence showed that there was no legally enforceable contract made or entered into between Plaintiff Emil Balley and defendant James Tozzi doing business as James Tozzi & Company; and the evidence further showed

that if a legally enforceible contract was in fact entered into between the parties, the purchase price for the potatoes was fixed at \$1.45 per cwt. plus accrued storage charges; and the evidence further showed that if a legally enforceible contract was entered into by the parties hereto, the plaintiff Emil Balley was in default therein in that he was not able, or ready, or willing to perform within the time limitation contained therein; and the evidence further showed that there was a novation which resulted in a complete abandonment of any prior contract made between plaintiff Emil Balley and defendant James Tozzi, doing business as James Tozzi & Company.

2. That the Conclusions of Law are not supported by the Findings of Fact or by the evidence, for the reason that there is no Finding whatever that the plaintiff Emil Balley sustained any damage whatsoever by reason of any breach of contract by the defendant James Tozzi, doing business as James Tozzi & Company, nor was there any evidence of any damage sustained by plaintiff Emil Balley as a result of defendant James Tozzi, doing business as James Tozzi & Company, breach of contract, if in fact any legally enforceible contract was entered into by the parties hereto.

3. That the Order appealed from by defendant James Tozzi, doing business as James Tozzi & Company, is insufficient in that it finds no support in the evidence or the Findings of Fact or the Conclusions thereon, for the reasons hereinabove set forth.

Wherefore, Defendant, James Tozzi, doing business as James Tozzi & Company, prays for a trial de novo before the above-entitled United States District Court.

SMALLPAGE and MACOMBER
Attorneys for Defendant and
Appellant, James Tozzi, doing
business as James Tozzi & Company. [32]

State of California,
County of San Joaquin—ss.

James Tozzi, being first duly sworn, deposes and says: That he is the defendant and appellant in the above-entitled matter; that he has read the foregoing Petition on Appeal and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information and/or belief, and as to such matters that he believes them to be true.

JAMES TOZZI

Subscribed and sworn to before me this 7th day of January, 1943.

(Seal) LAFAYETTE J. SMALLPAGE
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed Jan. 11, 1943. Walter B. Maling, Clerk. [33]

NOTICE OF APPEAL

Notice is hereby given that James Tozzi, doing business as James Tozzi & Company, defendant above-named, hereby appeals to the United States District Court, in and for the Northern District of California, Northern Division, from the Reparations Award and Order and the Proceedings, Findings of Fact and Conclusions in connection therewith of the Secretary of Agriculture, which Order, Proceedings, Findings of Fact and Conclusions were made and filed at Washington, D. C., on December 14th, 1942, bearing proceeding number P.A.C.A. Docket No. 4010.

This appeal is taken under the provisions of Paragraphs C & D of Section 7 of the "Perishable Agricultural Commodities Act, 1930, as amended" (7 U.S.C.A. Paragraph 499 G).

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Jan. 11, 1943. [34]

STIPULATION

(Regarding Evidence and Testimony in
United States District Court)

(1) It is stipulated that at the trial of the afore-said matter there may be received in evidence without objections by either plaintiff or defendant the testimony of witnesses Richard Emil Balley, Mrs.

Anna Svehek, Mrs. R. E. Balley, Claude M. Aunger, Willard Hill and James Tozzi, and

(2) It is further stipulated that the presence of said witnesses shall be dispensed with and that their testimony, as given before the Honorable H. D. Dechant, Examiner, for the United States Department of Agriculture on March 18 and 19, 1942, shall be admitted in evidence through the medium of certified copies of the Reporter's Transcript of said evidence.

(3) It is further stipulated that the depositions of witnesses Humble and Tillotson and the sworn statement of Wm. Streeter may likewise be shown in evidence.

(4) It is further stipulated that Plaintiff and Respondent may offer in evidence the following Exhibits as hereinafter designated upon the records of the Honorable H. D. Dechant. The burden of preparing and introducing such Exhibits shall be upon the Party offering the same.

(5) The opposing Party in his brief may object to the receipt of such testimony and the Court shall then pass upon the admissibility of the same:

(6) Emil Balley, Plaintiff and Respondent, now offers in evidence the following Exhibits:

Numbers 1-2-3-4-5-7-9-G.

Proceedings—Findings of Fact—Conclusions and Order of Secretary of Agriculture.

Reports of field agents Hilgeson and Dykes.

(7) James Tozzi, Defendant and Appellant, now offers the following Exhibits in evidence:

Numbers 6-7-8-9 and A-B-C-E-F-G-H.

(8) The Court shall fix Counsel fees.

WILSON S. WILEY,

Attorney for Plaintiff and
Respondent. [37]

SMALLPAGE AND MACOMBER,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Nov. 17, 1943. C. W. Calbreath, Clerk. [38]

OPINION AND ORDER

On the trial de novo of the claim of Emil Balley, the plaintiff and respondent, against James Tozzi, the defendant and appellant, for damages for breach of contract to sell to respondent 10,851 sacks of potatoes, I have weighed the evidence introduced before me to determine whether the plaintiff and respondent has established his claim by a preponderance of the evidence,—giving due regard, as required by statute, to the effect of the findings, conclusions and order of the Secretary of Agriculture as prima facie evidence of the facts therein stated. I have excluded from my consideration the reports of W. A. Hilgeson and J. W. Dykes, containing as they do, pure hearsay evidence incompetent in a court of law. And the objection of the appellant to the admission of these reports as evidence in this court is sustained. I am nevertheless satisfied from my examination of the competent evidence introduced before me by stipulation of the parties filed

herein, that the greater weight of the same is in favor of the facts as found by the Secretary of Agriculture; and his findings will therefore be those of this court with the following addition to the Secretary's Finding No. 8:—That the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon. My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law.

Judgment will be in favor of the plaintiff and respondent and against the defendant and appellant in the sum of \$4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940 until paid, together with the further sum of \$250.00 as and for counsel fees, and with costs.

Findings of Fact, conclusions of law and judgment shall be prepared, [65] served and submitted by counsel for plaintiff and respondent, and counsel for defendant and appellant shall have five days thereafter within which to propose counter findings.

Dated: April 24, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed Apr. 24, 1944. [66]

NOTICE OF ORDER FOR JUDGMENT

You Are Hereby Notified that on Monday, April 24, 1944 Judge Martin I. Welsh Ordered that judgment be entered herein in favor of the plaintiff and respondent and against defendant and appellant in the sum of \$4,971.56 with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, together with the further sum of \$250.00 as and for counsel fees, and with costs upon findings of fact and conclusions of law and judgment to be prepared and submitted by the attorney for the plaintiff and respondent.

C. W. CALBREATH,

Clerk, U. S. District Court.

Sacramento, California, April 25, 1944. [67]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Now on this day this matter coming on to be heard upon the motion of plaintiff and respondent, made in open Court, that the Court make and enter its Findings of Fact herein, and it appearing that nothing now remains to be done but to have the Court make and enter its Findings of Fact and Conclusions of Law, and

It appearing that this is an appeal from the "Proceedings, Findings of Fact, Conclusions, and Order," authorized by the provisions of the Perishable Agricultural Commodities Act, 1930, Docket No. 4010, made and published by the Secretary of

Agriculture of the United States, on December 14, 1942, in the above entitled cause, and

It appearing that the Secretary of Agriculture, after a formal hearing, held in Stockton, California, on March 18 and 19, 1942, did award to plaintiff and respondent, as reparation, the sum of \$4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, and

It appearing that the defendant and appellant refusing to pay to the plaintiff and respondent the reparation award so made did challenge the sufficiency of the Findings of Fact, Conclusions, and Order, of the Secretary of Agriculture, and, in conformity to the provisions of Section 7 (c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 1940 ed. 499a et seq.) did file an appeal in this Court from said Order, and

It appearing that thereafter certified copies of the "Proceedings, Findings of Fact, Conclusions, and Order," together with the pleadings in the case, consisting of the complaint, as amended, and the answer, as amended, were duly filed in this Court by the Secretary of Agriculture, with the Clerk, upon having been advised by the Clerk that said appeal had been so perfected and filed, and

This action having come on for trial in this Court on the seventeenth day of November, 1943, Wilson S. Wiley, appearing as attorney for the plaintiff and respondent, and Lafayette J. Smallpage, appearing as the attorney for the defendant and appellant, and the respective parties hereto having filed herein [68] a stipulation in writing reserving

the right to opposing counsel to object to the receipt of evidence offered under said stipulation, agreeing, however, in said stipulation, that the testimony of all the witnesses given before the Examiner for the United States Department of Agriculture through the medium of certified copies of the reporter's transcript of such testimony, certified copies of all depositions and sworn statements may be so received, without objection, and

It appearing that thereafter all of the exhibits or documents mentioned and described in said stipulation were offered in evidence herein, and

It appearing that among said exhibits or documents offered in evidence herein were two separate written reports of investigations of the controversy herein involved made by J. W. Dykes and W. A. Hilgeson, representatives of the United States Department of Agriculture, to which offer in evidence objection was made as to the admissibility thereof by the defendant and appellant, and

It appearing that, in compliance with the order of the Court, respective counsel have filed written briefs with the Court, in support of their respective contentions, based upon the record filed herein, and the Court having duly considered the record in this case, and being fully advised as to the law and facts in the premises, makes the following

FINDINGS OF FACT

1. That plaintiff and respondent is an individual whose post office address is Merrill, Oregon.

2. That defendant and appellant is a sole proprietorship owned by James Tozzi, whose post office address is Stockton, California, duly licensed, under the provisions of the Perishable Agricultural Commodities Act, 1930, during all the times mentioned in the complaint, as amended.

3. That on or about April 1, 1940, the plaintiff and respondent entered into a contract with the defendant and appellant, in the course of interstate commerce, for the purchase of 10,851 sacks of potatoes f.o.b. Klamath Falls, Oregon, for the sum of \$15,733.95. [69]

4. That on or about April 1, 1940, the plaintiff and respondent paid to the defendant and appellant the sum of \$2,500.00, which sum was to be applied on the purchase price of the potatoes.

5. That the sum of \$2,500.00 paid by the plaintiff and respondent to the defendant and appellant at the time of the consummation of the contract has never, nor has any part thereof, been repaid by the defendant and appellant to the plaintiff and respondent.

6. That on or about April 6, 1940, the plaintiff and respondent tendered a check in the amount of \$13,233.95 to the defendant and appellant, being the balance due under the contract, but the tender of the above-named sum was refused by the defendant and appellant.

7. That the defendant and appellant failed and refused to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, the subject matter of the contract, on or about April 6, 1940, and has continued to do so since that time.

8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds \$18,205.51, being an increase of \$2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon.

9. That the cause of action arose on or about April 6, 1940, and an informal complaint was filed on April 13, 1940, with the United States Department of Agriculture, which was within the nine months period allowed under the Act for the filing of a claim for reparation.

10. That by the terms of said contract the plaintiff and respondent did not agree to pay the storage charges, and, based upon the foregoing, and as [70]

CONCLUSIONS OF LAW

When the defendant and appellant refused to deliver the 10,851 sacks of potatoes because the plaintiff and respondent would not pay the storage charges, the defendant and appellant breached the

contract entered into between the parties, and, there has been excluded from consideration herein the reports of W. A. Hilgeson and J. W. Dykes, containing as they do pure, hearsay evidence incompetent in a Court of Law, and the objections of the defendant and appellant thereto are hereby sustained, it being considered however that the greater weight of competent evidence, introduced herein by stipulation of the parties, does sustain the facts as found by the Secretary of Agriculture.

That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant \$2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of \$15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive \$2,500.00 from the plaintiff and respondent and \$18,205.51 from the purchaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total sum of \$20,705.51, which represents receipts of \$4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the

sum of \$4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of \$250.00 as attorney's fees, with costs taxed at \$10.00. [71]

Done and dated this 6th day of June, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed June 6, 1944. C. W. Calbreath, Clerk. [72]

[Title of Court and Cause.]

JUDGMENT

Now on this day this matter coming on to be heard, and it appearing to the Court that this Court has heretofore made, signed and filed its Findings of Fact and Conclusions of Law, the matter having heretofore been tried to the Court, and the Court now being fully advised as to what judgment should be rendered in the premises;

It Is Therefore Hereby Ordered and Adjudged that the plaintiff and respondent, Emil Balley, have and recover of and from the defendant and appellant, James Tozzi, doing business as James Tozzi & Company, the sum of Four Thousand Nine Hundred Seventy-One and 56/100ths Dollars (\$4,971.56), with interest on said sum of money at the rate of five per cent (5%) per annum from April 6, 1940, to the date hereof, and thereafter at the lawful rate

of interest; for the additional sum of Two Hundred Fifty and no/100ths Dollars (\$250.00) as attorney's fees, and the sum of Ten Dollars (\$10.00) as costs incurred herein.

Done and dated this 6th day of June, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed June 6, 1944. C. W. Calbreath, Clerk. [73]

District Court of the United States, Northern District of California, Northern Division

No. 4586

EMIL BALLEY

vs.

JAMES TOZZI

NOTICE

To: Wilson S. Wiley, Medical Dental Bldg., Klamath Falls, Ore. Smallpage & Macomber, Savings & Loan Bldg., Stockton, Calif.

You Are Hereby Notified that on June 6th, 1944 a Judgment was entered of record in this office in the above entitled case.

You Are Hereby Notified that on.....
a Notice of Appeal was filed by.....

in the above entitled case. A copy of which is enclosed herewith.

C. W. CALBREATH,
Clerk, U. S. District Court.

Sacramento, California, June 6th, 1944. [74]

MOTION FOR NEW TRIAL AND NOTICE OF MOTION FOR NEW TRIAL

To Plaintiff and Respondent above-named and to Wilson S. Wiley and G. Q. D'Albini, Esq., 608-9 Medical Dental Building, Klamath Falls, Oregon, attorneys for Plaintiff and Respondent.

You and each of you will please take notice that on June 26, 1944, at 10:00 o'clock A. M., Defendant and Appellant will move the above-entitled Court, at the court room thereof, located in the Postoffice Building, Sacramento, California, to set aside the Findings of Fact and Conclusions of Law, in the above-entitled action, and the Judgment in the above-entitled action, and will move said Court for a new trial upon the following grounds, to-wit:

1. Insufficiency of evidence to justify the decision, in this, that there was no evidence whatsoever introduced in this case to show the fair market value of potatoes, the subject matter of the action, on April 6, 1940, at Klamath Falls, Oregon.

2. That the Findings of Fact and Conclusions of Law herein are not supported by the evidence in this, that there is no testimony whatsoever to

support Finding #8 of the Findings of Fact, for the reason that no evidence whatsoever was introduced which would show the fair market value of the potatoes, the subject matter of the action, at Klamath Falls, Oregon, on or about April 6, 1940.

3. That the Judgment rendered herein is against law in this: that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff purportedly purchased said potatoes and the reasonable value of the potatoes at the time and place of sale and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to- [75] wit: April 6, 1940, Klamath Falls, Oregon.

Said motion will be made and based on the records and files in the above-entitled action and upon the evidence introduced therein and the minutes of the Court.

Dated: June 9, 1944.

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant.

[Endorsed]: Filed June 10, 1944. C. W. Calbreath, Clerk. [76]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 3rd day of July, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh, District.

[Title of Court and Cause.]

No. 4586

The motion for a new trial having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion for a new trial be and the same is hereby denied. [77]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that James Tozzi, doing business as James Tozzi & Company, Defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 6th day of June, 1944,

in favor of Plaintiff above-named and against this Defendant.

SMALLPAGE AND MACOMBER,
Attorneys for Defendant and
Appellant,
511 Savings and Loan Building,
Stockton, California,
Phone: 4-4725.

[Endorsed]: Filed July 12, 1944. C. W. Calbreath, Clerk. [78]

SUPERSEDEAS BOND

Know All Men By These Presents:

That I, James Tozzi, doing business as James Tozzi & Company, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and duly authorized to transact a general surety business in the State of California, as surety, are held and firmly bound unto Emil Balley, in the sum of Eight Thousand and no/100 (\$8,000.00) Dollars, to be paid to the said Emil Balley; his attorney, successors, or assigns, to which payment we bind ourselves, our successors, or assigns, jointly and severally.

Sealed with our seals and dated this 10th day of July, 1944.

Whereas, on June 6, 1944, in an action in the District Court of the United States, for the Northern District of California, Northern Division, be-

tween Emil Balley, Plaintiff, and James Tozzi, doing business as James Tozzi & Company, Defendant, a Judgment was rendered against the said James Tozzi has duly filed a Notice of Appeal from said Judgment.

Now, the condition of this Bond is that if the said James Tozzi, doing business as James Tozzi & Company, shall prosecute his appeal with effect and satisfy the said Judgment in full, together with costs, interest, attorney fees, and damages for delay, if for any reason the appeal is dismissed and if the Judgment is affirmed and satisfied in full or such modification of the Judgment and such costs, interest, attorney fees, and damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the said principal has hereunto set his hand and the said surety has caused its corporate name and seal to be attached by its duly authorized attorney-in-fact at Stockton, California, this 10th day of July, 1944.

JAMES TOZZI, doing business as
James Tozzi & Company,
Principal,

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By A. E. GIANELLI,
Attorney-in-fact,
Surety. [79]

State of California

County of San Joaquin—ss.

On this 10th day of July, 1944, before me, the undersigned, Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared James Tozzi, known to me to be the person described in and whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] FORREST E. MACOMBER,
Notary Public in and for said
County and State.

State of California

County of San Joaquin—ss.

On this 10th day of July, in the year one thousand nine hundred and forty four before me, P. J. Riordan, a Notary Public in and for said County of San Joaquin, residing therein, duly commissioned and sworn, personally appeared A. E. Gianelli known to me to be the Attorney in Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of San Joaquin, the day and year in this certificate first above written.

[Seal] P. J. RIORDAN,
Notary Public in and for the County of San Joaquin, State of California. [80]

Approved this 12th day of July, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed July 12, 1944. C. W. Calbreath, Clerk. [81]

In the United States District Court, in and for the
Northern District of California, Northern
Division

No. 4586

EMIL BALLEY.

Plaintiff and Respondent,

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STATEMENT OF POINTS

The Appellant states that the points upon which he intends to rely in the appeal in this action are as follows:

1. That the judgment rendered herein is against law in this; that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940 in Klamath Falls, Oregon.

2. That the evidence was insufficient to justify the judgment in [82] this; that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

3. That the *finds* of fact and conclusions of law herein are not supported by the evidence in this; and there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

SMALLPAGE & MACOMBER,
Attorneys for Appellant.

[Endorsed]: Filed July 19, 1944. C. W. Calbreath, Clerk. [83]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 89 pages, numbered from 1 to 89, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Emil Balley vs. James Tozzi, doing business as James Tozzi & Co., No. 4586, Civil, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designations of Contents of Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing Record on Appeal is the sum of Fourteen and 80/100 (\$14.80), Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 11th day of August, A. D. 1944.

[Seal]

C. W. CALBREATH,

By F. M. LAMPERT,

Deputy Clerk. [90]

[Endorsed]: No. 10848. United States Circuit Court of Appeals for the Ninth Circuit. James Tozzi, doing business as James Tozzi & Co., Appellant, vs. Emil Balley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed August 12, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In the United States District Court, in and for the
Northern District of California, Northern Division.

No. 4586

EMIL BALLEY,

Plaintiff and Respondent.

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by the Attorneys for the re-

spective parties hereto, that the following constitute the Transcript of Record on Appeal:

1. Complaint with Amendments.
2. Answer with Amendments.
3. Proceedings, Findings of Fact, Conclusions, and Order made, entered and published by the Secretary of Agriculture of the United States, December 14, 1942. (PACA Docket No. 4010.)
4. Petition on Appeal to United States District Court.
5. Notice of Appeal to United States District Court.
6. Stipulation regarding evidence and testimony in United States District Court.
7. Opinion and Order of the United States District Court.
8. Findings of Fact and Conclusions of Law United States District Court.
9. Judgment of United States District Court.
10. Defendants Motion for a New Trial and Order Denying a new Trial.
11. Notice of Appeal to Circuit Court of Appeals.
12. Supersedeas Bond on Appeal to Circuit Court of Appeals.
13. Statement of Points on Appeal.
14. This Stipulation.
15. Condensed Statement of the evidence as follows:

STIPULATED CONDENSED STATEMENT
OF EVIDENCE

PLAINTIFF'S WITNESSES

(a) RICHARD EMIL BALLEY

After I completed school, in the fall of 1939 and spring of 1940, I engaged in the business of buying and selling potatoes. Prior to that time I had about five or six years experience in the potato business with C. V. Barton, and worked with my father raising and marketing potatoes. I did business with the L. A. Potato Distributors at Los Angeles, California; Dunbar McManus Company, San Francisco, and United Brokerage Company, of Portland, Oregon. (17, 18).

On or about March 29, 1940, I purchased thirty carloads of cold storage potatoes, stored at the Klamath Ice and Cold Storage plant, in Klamath Falls, Oregon, from James Tozzi, at his branch office, through his representative, William M. Streeter, giving him at that time a check, payable to James Tozzi & Company, in the amount of \$2500.00 as an advance payment on the purchase price of the potatoes. (19, 20).

Exhibit No. 1 is the original check for \$2500.00, copy of which is attached to the complaint and made a part thereof, and on this check is a notation as follows: "Advance on 30 carloads of potatoes 1.45 per cwt. potatoes grading US No. 1 Size A," (22) and it is shown thereon that the check was cashed March 30, 1940.

I gave Mr. Streeter, the representative of James

Tozzi & Company, this check for \$2500.00 on March 29, 1940 (20) with the understanding that this check would be held until April 1, 1940, so as to allow me to get in drafts and check my bank accounts to make sure the check would be valid at the bank at the time it was received, I having Saturday and Monday forenoon to make arrangements. On Monday I went to the bank and talked to Mr. Tillotson and told him there would be another check come in for \$13,000.00 or \$14,000.00 and at that time we made arrangements for the entire sum for the purchase of the Tozzi potatoes. (22, 23).

I received thirty invoices from the agent of James Tozzi & Company for these potatoes right around the 4th or 5th of April, 1940. (25)

Exhibit No. 2 consists of 30 invoices, one invoice for each of the thirty cars, copies of which invoices are attached to the complaint, or a total of 10,851 sacks of potatoes, each invoice bearing a notation thereon as follows: "100 lb. US One Goldseal brand russets FOB, price \$1.45." Some brands "Malin" instead of "Goldseal").

The potatoes were in Klamath Falls and they were to be delivered f.o.b. at Klamath Falls. (29). Prepared a contract. (30)

Mr. Smallpage: Before it is admitted, may I interrogate the witness?

Mr. Dechant: Yes.

Mr. Smallpage: Did I understand your counsel or attorney drew that contract?

The Witness: No, I drew that contract.

Mr. Smallpage: You drew it yourself?

The Witness: Yes, it was from a form that the Zuckerman and Company prepared, and it was sent by the L. A. Potato distributors of Los Angeles, California, one of their contract forms. I drew this myself from that form.

Mr. Smallpage: When did you draw it with respect to this giving of this \$2500.00 check?

The Witness: I drew that there on April 2nd or 3rd. (30, 31)

Mr. Dechant: Was that after the check, Exhibit 1, was delivered to Tozzi?

The Witness: Yes, it was. (32)

At the time the check was paid there was an understanding we would both reduce the agreement to writing. (33) I refused his contract and he refused mine on or about April 3rd or 4th. We had disagreed on this matter of the payment of storage (33).

So when I walked away he said: "I will see you the latter part of the week for payment," and I said: "All right, we will meet the latter part of the week for payment," which was April 6th. (33)

Direct Examination

Q. Did you meet with him on April 6th?

A. Yes, I did.

Q. Where did you meet him?

A. I met him at the First National Bank of Portland, at Merrill, Oregon.

Q. For what purpose did you meet him?

A. I met him to tender the balance payment of this agreement.

Q. How much did the balance payment amount to?

A. To the best of my knowledge, somewhere right around \$13,233.

Q. Did you tender that sum of money to him on that date at that time?

A. Yes, I did; I tendered him that sum of money on that date.

Q. In what manner did you tender that payment?

A. I tendered that payment to him in the First National Bank, as a matter of a check which was received but——

Mr. Smallpage: I didn't hear that answer.

A. (continued) As a matter of a check.

Q. (By Mr. Wiley) Did he receive that check which you offered him?

A. No, he did not. He refused because he said there was not enough money there.

Q. How much money did he demand?

A. He started hollering about that storage.

* * * * *

Q. What did you do after that?

A. After that, Mr. Streeter hollered, "Well, I am keeping the \$2500.00 and I am handing it over to my attorney."

Q. What did you do then?

A. Well, the only thing that I could have done was went and got my attorney and see if I could come to some type of agreement.

Q. Who was the attorney?

A. Clarence Humble.

Q. When did you go to see him?

A. I went to see him right after the conference at the bank, which was right around noon Saturday.

Q. And when you saw him what then happened?

A. Well, Mr. Humble says, "It is no use for fellows like you getting into a fight. I would like to have you take me down and have a talk with Mr. Streeter."

Q. Well, did Mr. Humble talk to Mr. Streeter about this? A. Yes, he did.

Q. Did Mr. Humble offer to make him this balance payment of \$13,233?

A. Yes, Mr. Humble offered to make him the balance payment.

Q. Did or did not Mr. Streeter again refuse?

A. Mr. Streeter refused again.

Q. Did you then communicate this disagreement to Mr. Tozzi?

A. Yes, I did. (33, 34, 35)

Exhibit No. 4 is a telegram dated April 6, 1940, from Balley to Tozzi, as follows: "Answering my agreement purchase price \$1.45 no agreement to pay storage Streeter now demands storage. Have cash to pay today in full but only on agreement of \$1.45 clear to date of purchase. Wire reply." (37)

Q. Were any of the potatoes involved in this transaction ever delivered to you?

A. None whatsoever.

Q. After the disagreement to Mr. Streeter in regard to the matter of the payment of Mr. Tozzi's storage bill, did Mr. Tozzi ever offer to return to you the \$2500 you had paid?

A. He had never offered to return to me the original \$2500.

Q. Did he ever return it to you?

A. No, he has never returned it to me.

Q. Did Mr. Streeter ever offer to return you this \$2500?

A. No, he has never offered. (39, 40)

* * * * *

Mr. Dechant: Is there going to be any issue that Mr. William Streeter was not an agent of Tozzi & Company?

Mr. Smallpage: No, no dispute. We stipulated that. We admitted that in our pleadings. (40, 41)

Mr. Dechant: Well, I didn't think there would be but I just asked the question because the matter had come up.

Q. (By Mr. Wiley) Mr. Balley, you testified that you were engaged in buying and selling potatoes at the time of this transaction with Mr. Tozzi. Had you communicated with any of your dealers or have any prospects for the resale of these potatoes?

A. Yes, I did, I had prospects of resale of all of those potatoes.

Q. To whom did you communicate with regard to these potatoes?

A. I communicated with United Brokers of Portland, Dunbar McManus of San Francisco, and L. A. Potato Distributors of Los Angeles.

Q. Did you have any offer for the purchase of these potatoes?

A. Yes, sir.

Mr. Smallpage: To which we object on the grounds that it is incompetent, irrelevant, and immaterial, and not the fair measure of damage, the fact that this witness has rescinded the contract, and the only recovery would be the return of his \$2500. If he elects to go ahead with the contract, which is apparently what he desires to do, then his measure of recovery is the loss of market value.

Mr. Wiley: Your Honor, I believe it has been brought out that this contract was made in Oregon, and any evidence that tends to establish the loss sustained, definite evidence, I believe would be admissible to show the measure of damage. We have——

Mr. Dechant: I will overrule the objection. Go ahead.

Q. (By Mr. Wiley) You say you had communicated with United Brokers about the sale of these potatoes? A. Yes, I had.

Q. Did you make an offer for these potatoes?

A. They didn't make me a distinct offer, United Brokers and I worked a joint account daily at that time.

Q. Just explain how you would have handled the potatoes?

A. I would have shipped the potatoes to United Brokers, which I wanted to ship as many carloads as I wanted to ship, and if I didn't want to ship any I would not, at the original price of \$1.45, and then we would split the profits or losses, if there had been losses we would have split those, and if

there had been profits he would have received 50 per cent and I would have received 50 per cent.

Q. How would you have been paid for these potatoes if you had shipped to United Brokers?

A. I would have been paid the original price by a draft and the profit would generally be received by a check after the carload lot was sold.

Q. Did you communicate with any other parties about the sale of these potatoes?

A. Yes, I did; I communicated with the L. A. Potato Distributors.

Q. Any one else?

A. Dunbar McManus of San Francisco.

Q. Did Dunbar McManus Company indicate to you that they wanted to buy these potatoes?

A. They indicated that they would handle a few potatoes, yes: they would like to have some of those potatoes.

Q. Had you got to the point where you had quoted a price to them?

A. Yes, I had quoted a price; I had quoted a price to Dunbar McManus and also L. A. Potato Distributors.

Q. What price did you quote to those parties?

A. I quoted a price of \$2 F.O.B.

Q. Did either one of them accept this offer?

A. L. A. Potato Distributors accepted the quoted price.

Q. What price did you say?

A. \$2 F.O.B.

Q. F.O.B. where?

A. Klamath Falls.

Q. That is in the State of Oregon, isn't it?

A. Yes.

Mr. Wiley: To shorten this thing up, Mr. Commissioner; I have some correspondence had between these parties. I don't know whether we should tender each letter separately or not.

Mr. Dechant: Well, would it be possible for you to talk to Mr. Smallpage and find out whether he is agreeable and we can just introduce them as exhibits if they are material, if you think they are material and he has no objection to them?

Mr. Wiley: Well, they have a bearing in this respect, that they show he has been in the potato business and been dealing with different people, and it corroborates the joint account with United Brokers and prices from others.

Mr. Dechant: Oh, that is correspondence not with the respondent?

Mr. Wiley: It is correspondence with the brokers.

Mr. Dechant: Then you had better submit them to Mr. Smallpage and find out whether he has any objection.

(There was a consultation between counsel.)

Mr. Smallpage: I suggest we look them over during the—you adjourn at twelve?

Mr. Dechant: Yes.

Mr. Smallpage: It is nearly twelve now, and I will look them over during the recess.

Mr. Wiley: It just indicates Mr. Balley was in business and had certain customers.

Mr. Dechant: You can stipulate to that if Mr. Smallpage is willing.

Mr. Wiley: I might ask one or two questions.

Q. (By Mr. Wiley) Mr. Balley, you said you had correspondence with—I believe you named two or three dealers. Where are they located?

A. Well, there is a house located in Los Angeles one in San Francisco, and one in Portland, Oregon.

Q. Had you sold these parties potatoes previously.

A. Yes, I had.

Q. Will you state whether or not you were authorized to draw on them for the purchase of potatoes?

Mr. Smallpage: To which we object upon the ground that that is a legal conclusion.

Q. (By Mr. Wiley): Had they furnished you with draft books?

Mr. Dechant: I will overrule the objection. He may answer.

A. Yes, they have furnished me with draft books.

Q. (By Mr. Wiley): They had furnished you blank forms of drafts to draw on them?

A. Yes.

Q. In shipping potatoes to them?

A. Yes.

Mr. Dechant: Will you take the stand again?

Testimony of Richard Emil Balley, Esq., previously sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Smallpage:

Q. Mr. Balley, I understood you to say on your direct testimony this morning that your first business relations with Mr. Streeter, and through him with Mr. Tozzi, for the purchase of these potatoes was on March 29, 1940? A. Yes.

Q. Are you sure of that? A. Yes.

Q. Didn't you make them an offer prior thereto for the purchase of these potatoes?

A. I did not make them any offer.

Q. Did you ever purchase any other potatoes from Streeter? A. Yes, I did.

Q. When?

A. Sometime during the month of February.

Q. And what did you pay for those potatoes?

A. To the best of my knowledge, I don't know. It was under an Army contract or Navy contract.

Q. Were you quoted a price plus storage or without storage?

A. Without storage.

Q. In other words, you did not pay storage?

A. I did not.

Q. Was that contract reduced to writing?

A. No, it was just a direct sale made and the cars were loaded at Bakersfield, California.

Q. And you got an account sales, did you?

A. Yes, I did.

Q. Now, other than that, is that the only transaction that you had with Streeter?

A. That is the only business transaction, yes.

Q. I present to you a letter dated April 17, 1940, addressed to Mr. Tozzi, purportedly signed by you. Did you sign that?

A. (After examining): Yes, I did.

Q. You caused it to be mailed to Mr. Tozzi?

A. Yes.

Mr. Smallpage: We ask that it be introduced in evidence and marked Respondent's Exhibit A.

Mr. Wiley: I would like to offer an objection to it on the ground, your Honor, that it relates to preliminary negotiations, first; second; there is nothing in writing whereby Mr. Balley under our Statute of Frauds in Oregon agreed to—

Mr. Dechant: Let me read the letter. I cannot tell until I look the letter over.

Mr. Smallpage: It is admissible on two grounds, first as rebuttal of his testimony that it is the first time he had negotiations—that letter is a statement to Mr. Tozzi that he had offered \$1.40 for these particular potatoes plus storage and that offer had been refused.

Mr. Dechant: (After examining): I will overrule the objection. The letter is admitted as Respondent's Exhibit A.

(Thereupon the document referred to was received in evidence and marked Respondent's Exhibit A.)

Q. (By Mr. Smallpage): Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

"I purchased potatoes from Streeter, and when

Cross Examination

By Mr. Smallpage:

Q. Mr. Balley, I understood you to say on your direct testimony this morning that your first business relations with Mr. Streeter, and through him with Mr. Tozzi, for the purchase of these potatoes was on March 29, 1940? A. Yes.

Q. Are you sure of that? A. Yes.

Q. Didn't you make them an offer prior thereto for the purchase of these potatoes?

A. I did not make them any offer.

Q. Did you ever purchase any other potatoes from Streeter? A. Yes, I did.

Q. When?

A. Sometime during the month of February.

Q. And what did you pay for those potatoes?

A. To the best of my knowledge, I don't know. It was under an Army contract or Navy contract.

Q. Were you quoted a price plus storage or without storage?

A. Without storage.

Q. In other words, you did not pay storage?

A. I did not.

Q. Was that contract reduced to writing?

A. No, it was just a direct sale made and the cars were loaded at Bakersfield, California.

Q. And you got an account sales, did you?

A. Yes, I did.

Q. Now, other than that, is that the only transaction that you had with Streeter?

A. That is the only business transaction, yes.

Q. I present to you a letter dated April 17, 1940, addressed to Mr. Tozzi, purportedly signed by you. Did you sign that?

A. (After examining): Yes, I did.

Q. You caused it to be mailed to Mr. Tozzi?

A. Yes.

Mr. Smallpage: We ask that it be introduced in evidence and marked Respondent's Exhibit A.

Mr. Wiley: I would like to offer an objection to it on the ground, your Honor, that it relates to preliminary negotiations, first; second; there is nothing in writing whereby Mr. Balley under our Statute of Frauds in Oregon agreed to—

Mr. Dechant: Let me read the letter. I cannot tell until I look the letter over.

Mr. Smallpage: It is admissible on two grounds, first as rebuttal of his testimony that it is the first time he had negotiations—that letter is a statement to Mr. Tozzi that he had offered \$1.40 for these particular potatoes plus storage and that offer had been refused.

Mr. Dechant: (After examining): I will overrule the objection. The letter is admitted as Respondent's Exhibit A.

(Thereupon the document referred to was received in evidence and marked Respondent's Exhibit A.)

Q. (By Mr. Smallpage): Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

"I purchased potatoes from Streeter, and when

I made the agreement the first time it was \$1.40 plus storage, and the second time I came back to purchase said potatoes I had to pay \$1.45 and storage was not mentioned. I went to pay Streeter hereon the 3rd of April," and so on.

Now, did you not in this letter refer to the potatoes the subject of this controversy?

A. It was the same potatoes, yes.

Q. So that, as a matter of fact, then, prior to this contract with Mr. Streeter on March 29, 1940, you had contacted him before and offered him a price of \$1.40 plus storage?

A. I did not offer him a price, no.

Q. Then did you get a quotation from Streeter?

A. I got a quotation from Streeter.

Q. And he told you definitely at that time he wanted \$1.40 plus storage for these particular potatoes, is that right?

A. The storage was mentioned, yes.

Q. And the price was mentioned?

A. That price was mentioned, yes.

Q. And what was the date of that conversation?

A. To the best of my knowledge, it might have been right around the 22d or 23d of March.

Q. In other words, then, about a week prior to this second conversation which led to the contract in question? A. Yes.

Q. Now, during that period of time did the potato market increase in price or decline?

A. Well, to the best of my knowledge, the potato market did not increase or did not decline.

Q. It was stationary, then?

A. It was about stationary, yes.

Q. Now, when he told you that he wanted a price of \$1.40 plus storage, did you know at that time how much the storage was?

A. No, I never; I just passed the deal, that is all.

Q. What is that?

A. I never knew anything about the storage. I just passed up the deal, that is all.

Q. You know what the word "storage" means?

A. Yes.

Q. You know what the rate is in Klamath Falls?

A. I didn't know what the rate was at that time.

Q. You had no idea?

A. None whatsoever.

Q. You had bought potatoes for these various brokers you told us about? A. Yes.

Q. Didn't you come in contact with storage rates?

A. No, I never did come in contact with storage rates.

Q. In other words, I am to infer from your testimony now that throughout your entire experience in the potato buying market in Klamath Falls, which was apparently quite extensive, you never came in contact with the rate of storage?

A. I never have.

Q. So, at the time Mr. Streeter quoted you this price of \$1.40 plus storage, you didn't know whether that was 5 cents, 10 cents, or 20 cents a bag?

A. I didn't know what it was.

Q. You had no idea.

A. None whatsoever.

Q. Now, I assume you were in the market to buy potatoes at that time, weren't you?

A. I was buying potatoes at that time, yes.

Q. And that was the object of your visit to Streeter on March 22d?

A. No, I did not visit Mr. Streeter on that day. I was out looking for two more boys that had some potatoes up there and had them on contract.

Q. You did contact Streeter on that day?

A. I stopped and asked him if he had seen the other two brokers up there, yes. He was at the railroad tracks.

Q. Didn't you ask him if he had some potatoes to sell?

A. Never asked him a thing about his potatoes.

Q. He just came out of the clear sky and told you he had some potatoes to sell at \$1.40 plus storage?

A. That is perfectly true, yes.

Q. And that storage meant nothing to you?

A. Meant nothing to me, no.

Q. What were you paying for potatoes up there to other sellers at **that time**?

A. I was buying, loaded f.o.b. cars between Malin and Klamath Falls, at \$1.40 per hundred.

Q. You stated that the second time you came back to purchase the said potatoes Streeter told you that you had to pay \$1.45, and the storage was not mentioned?

A. Yes.

Q. Not a word said about storage?

A. Not a word.

Q. Did you ask him anything about storage?

A. Never asked him anything.

Q. There were 10,000 bags, approximately, of potatoes, in the deal, is that right?

A. Yes, somewheres right around those figures.

Q. So that storage at the rate of \$1,000 would be approximately 10 cents a bag?

A. Right around 10 cents, yes.

Q. Now, as I understand it, just a rough—to sum up your testimony, this conversation which was held on April 3d was the first time that you knew that Streeter expected you to pay \$1.45 plus storage, which would make the total price \$1.55, is that right? A. I believe it was.

Q. I call your attention to your letter, your exhibit, the Complainant's Exhibit there, the letter of April 4th, addressed by you to the Los Angeles Potato Distributors, in which you state:

“Today I called on Tozzi's man, Streeter, to sign the storage potato deal contract and he refused to do so, but he gave me the warehouse receipts, and accepted my check. So I think I have him where I want him. He never wrote or had me make on the receipt that I would pay storage, so do you think I would have to?”

Just what did you have in mind when you used that language, “So I think I have him where I want him”?

A. Well, on those potatoes there, that deal, as I say, I think it was the 3d of April when I contacted Mr. Streeter, the storage deal arose, and all

this time I was telephoning and corresponding with L. A. Potato Distributors of Los Angeles, and there was at that time potatoes on contract and I had this deal going through and it was a good deal; it looked good to me. I had them pretty well sold, and I would have made some good money; so I figured this deal was going through, that is all.

Q. Why did you use that language, saying you think you have got Tozzi where you want him? In other words, did you think that Streeter had sort of slipped up, as it were, in making out that warehouse receipt by not indicating there on it that storage should be included and therefore you were in a position to take advantage of the situation?

A. None whatsoever.

Q. Now, let me see. Going back to this letter of April 4th, you state, "I cannot get potatoes here any less than \$1.45 to \$1.55 naked,—" That means without the sacks, doesn't it?

A. That is right.

Q. Sacks are worth how much.

A. Sacks were worth about 10 cents at that time.

Q. So those potatoes sacked, then, would be \$1.55 to \$1.65?

A. That is right.

Q. And that is exactly the price that Streeter quoted you? Didn't he quote you a price of \$1.55 in sacks?

A. No, he quoted me a price of \$1.45.

Q. Taking it from his version of the contract, his quotation was \$1.55?

A. I don't know what his version was; mine was \$1.45.

Q. Why did you make the statement then to your distributor that you could not get potatoes less than \$1.45 to \$1.55 naked, which, putting it on a parity with the Streeter potatoes, would amount to \$1.55 to \$1.65?

A. Well, when you taper down at Klamath Falls to about four or five growers, they will hold what they want—they will take the best and hold them for the best price. Why should I worry if I cannot get potatoes at \$1.45 or \$1.55; I had an agreement at that time with Mr. Streeter.

Q. But you have told your Los Angeles Potato Distributors that, and you referred here to the Streeter potatoes?

A. Yes.

Q. You said that you could not get them at less than a price of \$1.55 or \$1.65?

A. All right.

Q. Then you made a misstatement of fact to the Los Angeles Distributors?

A. I might have done it; it can be possible too.

Q. All right. Did it seem strange to you—withdraw that. When this quotation of \$1.40 plus storage was made by Mr. Streeter to you on or about March 22d, did you think that price too high or too low?

A. No, I didn't know much about the price right there. I had just got around to see about the potatoes, and I couldn't tell you whether it was too high or too low.

Q. Did you buy any potatoes that day?

A. Yes, I believe I did.

Q. What did you pay for them?

A. I believe I paid \$1.25 naked.

Q. And what type of potatoes?

A. Sand-land potatoes.

Q. Is that the same type that Mr. Tozzi's potatoes were? A. Yes, sir.

Q. You paid \$1.25 naked, which in sacks would be equivalent to \$1.35?

A. That is right.

Q. And did you buy them delivered or out in the country?

A. I bought them delivered to the car, yes. They were out in the country but they would deliver them to the cars there. That is understood between grower and buyer.

Q. Now, then, when you were willing to pay \$1.45 in sacks a week later, it is fair to assume that the market was rapidly advancing?

A. Yes, the market looked good on old stock.

Q. Didn't it seem strange to you that Mr. Streeter quoted you a price of \$1.40 plus storage, which evidently was around 10 cents as of March 22d, and that he would reduce his price a week later? A. No, it was not strange to me a bit.

Q. Why not?

A. Because he quoted potatoes, the same potatoes, to Dalton & Evans at \$1.50, and they says, "Nothing doing," and that was not plus storage either.

Q. Are you sure of that?

A. I am very positive.

Q. What evidence do you base that statement upon?

A. What evidence?

Q. Yes.

A. On the evidence that Mr. Paul Dalton and Mr. Evans both told me in their own office that they had a teletype message that they wired to Hanson just what I stated, at \$1.50 f.o.b. car.

Q. Now, at the time you bought these potatoes, weren't you buying on joint account with Ross Phillippi?

A. Yes, I was buying on a joint account.

Q. In other words, he was jointly interested with you in the purchase of these potatoes?

A. No, he was not.

Q. What is the purport of this letter that you wrote to them on April 4th? On April 4th you state in a letter addressed to the United Brokers Company to a gentleman by the name of "Dear Ross," "Yes, we shall also agree to a joint account—" strike that out.

The letter reads as follows:

"If I see that I can make something of the Tozzi deal, referring to some cars, I will immediately confirm to you either by wire or by 'phone. Yes, we shall also agree to a joint account with you in which we share 50 per cent of loss and 50 per cent of profit . . .

"Potatoes here are selling for \$1.45 to \$1.65 naked."

This is on April 4th? A. Yes.

Q. Well, is it not a fact that Mr. Ross Phillippi was interested in this proceeding with you?

A. No, he is not. We work on a joint-account basis just exactly like if Mr. Tozzi worked on a consignment basis with somebody else. I put up the money and if I want to send them up there I do so and I take my chances on taking profits or losses. It was all my money in the deal. On a joint account basis generally the broker puts up the money from their own, the buyer buys them and ships them to him, and the deal is a joint deal.

Q. Now, coming back to this Ross Phillippi deal, you state in this letter of April 4th to him, as you stated to the Los Angeles Potato Distributors, "Potatoes here are selling for \$1.45 to \$1.55 naked." That would mean \$1.55 to \$1.65 in sacks, wouldn't it? A. Yes.

Q. And in your opinion was that the market price? A. Yes, as I said before, it was.

Q. Do you think that Mr. Streeter would sell you potatoes at \$1.45 when the minimum price, as you have stated in your letter, or the market price, was \$1.55 to \$1.65?

A. Yes, he would, because he didn't know what happened on March 29th when I bought the potatoes.

Q. In other words, Mr. Streeter was not conversant with the market price?

A. I guess not, not at that time. That was four days later.

Q. You say the market jumped four days later?

I note in your letter to Dunbar McManus of March 26th you state, "The market has jumped 5 to 10 cents higher." So, it started jumping along about March 26th, didn't it?

A. It started jumping right around March 20th, on through there.

Q. These potatoes in question were what is designated as "Klamath U. S. No. 1 russets," is that right? A. Right.

Q. In your letter of April 2d to Dunbar McManus you state that this type of potatoes are selling from \$1.75 to \$2. Did you mean that?

A. Certainly.

Q. In other words, at the time you presented this contract to Mr. Streeter, wherein you state he agreed to sell you at \$1.45, in your opinion then the market was \$1.75 to \$2? A. Yes.

Q. At the time that you purchased—let me see. On March 29th you purchased these potatoes from Streeter? When did you first contract any of them with a possible buyer?

A. Well, the first time I—the first time Mr. Streeter ever offered me the deal I had right around thirty or forty cars with Dalton & Evans at that time too. I had quite a few of them on contract and when I was submitted the price of \$1.40, and Dalton and Evans submitted the same price of \$1.40 f.o.b. car, I went to work on the deal right away.

Q. Well, did you ever sell any of these Tozzi potatoes? A. Never sold a sack, no.

Q. On April 2d I note that you wrote Dunbar and McManus and said that you had purchased these thirty cars of storage potatoes and you wanted to know if they would buy some of them. Did they ever make you a firm offer?

A. He made me an offer, yes.

Q. What was the offer?

A. He made me an offer of about \$2.

Q. Where is that offer?

A. That offer should be somewhere in the correspondence. I don't know whether I have it here with me or not.

Q. \$2 where? A. F.O.B. Klamath.

Q. \$2 a sack f.o.b. Klamath?

A. Yes, and that delivery was not to be until right around May.

Q. And how many sacks?

A. He didn't quote how many sacks he wanted. He said, "I will handle some of those potatoes for you."

Q. Did he say that in writing?

A. It should be in writing, yes.

Q. Did he buy them outright, or was he going to sell them, handle them on a commission basis?

A. He was going to buy them outright, no consignment.

Q. What? No consignment?

A. No consignment.

Q. That seems strange to me when you were writing him and telling him you will sell them for \$1.65, on April 4th you state here you will sell him the Tozzi potatoes at \$1.65.

A. That is perfectly all right.

Q. And yet you tell me that in the face of the quotation by you to Dunbar McManus that you will sell them to him at \$1.65, he says he will pay you \$2?

A. Yes.

Q. Do you want us to believe that?

A. Did you ever figure out the actual storage charges between one month and the other?

Q. Do you know what they are?

A. Certainly I do today, yes.

Q. What are they? A. About 20 cents.

Q. About twenty cents a month?

A. Yes, 20 cents in two months; that is 10 cents a month.

Q. That is 10 cents a month?

A. If he keeps them potatoes in one day after May 1st I have to pay 10 cents on all the potatoes.

Q. You state the price here—you quoted him, where you said you can deliver the Tozzi potatoes to him at \$1.55 to \$1.65, and if you held them one month that would be only \$1.75?

A. \$1.75, all right.

Q. And yet you state that after you gave him that quotation he returned with an offer that he would pay you \$2? A. That is true.

Q. And you want us to believe that?

A. Yes. I do.

Q. All right. Well, I have a letter here in your exhibit dated April 20th, from Dunbar and McManus wherein they quote you—state that they will only pay \$1.40 for these potatoes.

A. That was after the deal was all over. The market went straight down. * * * *

Q. On April 6th? Now, in April when you and Mr. Streeter could not get together over the terms of this agreement for the purchase and sale of these potatoes, you immediately made a complaint, I take it, to the Agricultural Bureau?

A. Yes, there was a man suggested I take the deal up there.

Q. And to whom did you make that complaint?

A. To W. A. Hilgeson.

Q. And when was it you made that complaint?

A. I believe around the 14th day of April, but maybe later. That is the best of my knowledge.

Q. Had the market declined or the price at that time, or was it on the up grade?

A. The potato market?

Q. Yes.

A. I couldn't tell you anything about the potato market. I was not well up on it. I was working on this and I didn't keep up with the market at all.

Q. I thought you were in touch with the potato market during this period.

A. I was in touch with the market but not at this time. After this controversy between Mr. Streeter and I, I didn't pay much attention to it at all. Most of my contacts were with attorneys to see if we could not get this matter settled.

* * * * *

Q. Again, I believe you testified that you had had an offer of \$2 a hundredweight. I didn't get

whether it was from Dunbar McManus or some other dealer in California.

A. That is right.

Q. Was that correct, was it Dunbar McManus or somebody else?

A. I believe it was Dunbar McManus. I am not quite sure.

Mr. Wiley: This is a letter we would like to offer in evidence.

Mr. Dechant: Any objection?

Mr. Smallpage: Well, it is hearsay.

Mr. Dechant: We take that into consideration. I will admit it as Complainant's Exhibit No. 10.

(Thereupon the document referred to was received in evidence and marked Complainant's Exhibit No. 10.)

Cross Examination

By Mr. Smallpage:

Q. What was that f.o.b. Los Angeles or Klamath Falls? A. F.o.b. cars, Klamath Falls.

Q. It doesn't say so.

A. I don't know. I don't remember the letter exactly.

Q. That is before you negotiated for these potatoes? It was May 25th? A. Yes.

Q. And your testimony is that you first negotiated for the purchase of these potatoes March 29th, that is correct? A. That is correct.

Mr. Smallpage: That is all.

Exhibit No. 10 is a letter, dated March 25th, 1940, addressed to Mr. Emil Balley by the L. A. Potato Distributors, Inc., and is as follows:

Regarding the fancy sandland potatoes you bought and have stored in the ice house. I was thinking if you wanted to turn them we could buy 20 cars or all of them if you care to turn loose at this time at \$2.00 f.o.b. the price as per our telephone conversation.

I would like to leave them there for a while and take them as we need them. We could pay you half down and the balance when you load out the cars.

I feel that we are taking a chance in buying so many at this price, but believe like you do that the market is going up and we are apt to make some good money on these providing they are as fancy as you say they are.

We have bought several cars from you already and you certainly know quality, so we are trusting that these potatoes you have stored are as good as what you have been sending us.

Please let us hear from you immediately. You had better get me on the phone tonight and let me know if you care to sell us these potatoes.

(b) DEPOSITION OF CLARENCE A.
HUMBLE:

I have practiced as an attorney at law in Klamath Falls, Oregon, for eleven years, and am at present Deputy District Attorney, and President of the Klamath County Bar Association, and knew Emil Balley, who came to see me regarding a contract with Tozzi & Company for the purchase of certain

potatoes, said he had paid Mr. Streeter \$2500 down, and he had seen him the morning he came in to see me, and that a disagreement had arisen with regard to the payment of storage charges, and after he had shown me the check I was of the opinion he was not liable for the warehouse charges. We went to Malin and I showed Streeter the check with the agreement written on it, but he didn't agree with me. We then went to the bank, and I asked Emil if he was in a position to pay and he assured me he was.

"And Streeter refused to even consider the payment of \$13,000.00 unless we would agree to pay the warehouse charges, and we refused to pay or assume to pay the warehouse charges. Now my recollection is that at that point the thing just kind of blew up and everybody walked away." (pp 25 and 26.)

Q. Was the matter of making this payment discussed?

A. No, no; if I may elaborate on that. I insisted, before anything was transferred from Balley to Tozzi's account, that we be given assurance that Tozzi & Company was going to take care of those storage charges. My recollection is that nothing was ever said whether the money was to be paid in cash or frog skins.

Q. Did you make the offer to make payment, or did Mr. Balley make this offer to make payment?

A. My recollection—it is a recollection, you appreciate, is that we both offered payment.

(c) DEPOSITION OF MITCHELL
TILLOTSON:

I am manager of the First National Bank of Portland, Klamath Falls Branch, since June, 1936, and am acquainted with Emil Balley, who had been carrying an account in our bank two or three years.

A. "He told me he had purchased potatoes from Mr. Tozzi and that the potatoes were sold to the Los Angeles Potato Distributors, or Ross Phillippi. We agreed with Mr. Balley we would honor his draft on that order, against the Los Angeles Potato Distributors, for the shipment he made to them; we agreed we would honor his draft on Ross Phillippi or the United Brokers—whichever he was drawing on—to the extent of one car at a time, and that car should be paid for before further drafts were honored." (6)

Q. Let's come back to March, 1940; what type of document did you have from the Los Angeles Distributors guaranteeing the payment of drafts drawn on them by Mr. Balley?

A. We had an order (probably Exhibit No. 10) or, he had an order from them for the potatoes.

Q. You mean, an individual lot of potatoes; is that right?

A. An individual lot or whatever lot they ordered. (p. 5)

A. We would take care of some overdrafts on his account, under specific arrangements, and knowing what the money was to be used for and how it was to be used. (5)

Q. It has been alleged that this deal was to be consummated on April 6th in your bank, and that you had the money right there to give to Mr. Tozzi—that implies of course, that a line of credit had been arranged for, that these records had been made and that the deal, in so far as Mr. Balley and the bank were concerned, had been fully and thoroughly consummated, does it not?

A. I would assume so.

Q. But that is not a fact, is it?

A. Yes, it is a fact.

DEFENDANT'S WITNESSES

(1) JAMES TOZZI:

I live in Stockton, and I have been engaged in the fruit and produce business fully thirty years, and have extensive operation with branches in New York and various cities. Mr. Streeter worked for me in 1940. In March, 1940, I had around 30 cars of potatoes in storage at Klamath Falls. (128)

Q. Do you know whether or not Mr. Balley solicited the purchase of these potatoes in March of 1940?

A. Well, the information I had from Streeter was that Balley had taken an option on these potatoes some time around March 15th, in there, and if I remember correctly the option that he had was \$1.40 plus storage.

Q. Was that option exercised?

A. No. Then the option expired and the market started showing strength. In fact, It think

it could be verified by Government reports that the market advanced between 10 to 25 cents.

Q. A bag? A. A bag. (128)

Exhibit G is a statement of account with regard to the sale of the potatoes by James Tozzi and Company.

Q. (By Mr. Smallpage): Now referring to Exhibit G, Mr. Tozzi, what was the total amount received from the sale of those potatoes?

A. \$18,205.51.

Q. And is that the same amount that the investigator Mr. Dykes ascertained?

A. Yes, sir.

Q. Now, I note that you have added \$2500, being the payment that you received from Mr. Balley; so that would make a total amount of \$20,705.51?

A. That is correct.

Q. Now you have some deductions?

A. Well, we paid the cold storage company \$1660.70.

Q. Attached to this Exhibit G the second page of it—

A. (Interposing): Yes, the statement from the cold storage company.

Q. Now, your selling expense was how much?

A. Selling expense was 10 cents a sack, \$1085.10.

Q. And that left a net return of how much?

A. That left a net return of \$17,959.71.

Q. And less the cost of the potatoes?

A. Less the cost of the potatoes.

Q. That is what you had contracted with Mr. Balley? A. \$15,733.95.

Q. Which leaves a net of what?

A. \$2225.76. (135, 136)

The buyer pays the cold storage, not the seller.
(148)

In my office in Bakersfield, when Balley and Streeter were present, Streeter reported to Balley: Didn't you try to buy the potatoes for \$1.40 plus storage, and when I sold you the potatoes for \$1.45, the market had advanced fully a quarter. I gave you the terms of \$1.40 plus storage, and how could I sell you the potatoes at \$1.45 and assume the storage later when the market had advanced 15 cents or a quarter? (130)

SWORN STATEMENT OF

(2) WILLIAM M. STREETER

On March 29, 1940, Mr. Balley entered my office very hastily and asked me if I had sold my cold storage potatoes which I had shown him previously. I advised him that he might be a little late as I had given Dalton and Evans an option on them, and Mr. Balley advised me that he had to have this lot somehow. If he wanted the potatoes he must put up a check for \$2500, payable to James Tozzi & Co. Deal closed.

Dated: This 7th day of August, 1944.

Respectfully submitted,

SMALLPAGE & MACOMBER,

511 Savings & Loan Bank
Building, Stockton, Cali-
fornia,

Attorneys for Defendant and
Appellant.

WILSON S. WILEY,

608 Medical Dental Building,
Klamath Falls, Oregon,

Attorney for Plaintiff-
Respondent.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal] C. W. CALBREATH,

Clerk, District Court of the U. S. Northern Dis-
trict of California.

By F. M. LAMPERT,

Deputy Clerk.

[Endorsed]: Filed Aug. 11, 1944. C. W. Cal-
breath, Clerk.

[Endorsed]: Filed Aug. 15, 1944. Paul P.
O'Brien.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10848

EMIL BALLEY,

Plaintiff and Respondent,

vs.

JAMES TOZZI, doing business as JAMES TOZZI
& COMPANY,

Defendant and Appellant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF PARTS
OF RECORD IN SUPPORT THEREOF

Now comes the Appellant above-named and states that the points upon which he intends to rely in the appeal in this action are as follows:

1. That the judgment rendered herein is against law in this; that the burden was upon Plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that Plaintiff could have sustained, were measured by the difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940 in Klamath Falls, Oregon.

2. That the evidence was insufficient to justify the judgment in this; that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

3. That the findings of fact and conclusions of law herein are not supported by the evidence in this; that there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

4. That the parts of the record which Appellant considers necessary for the consideration of his points on appeal consist of all of that part of the record included in the "Stipulation as to Record on Appeal" dated August 7, 1944, and signed by Counsel for Appellant and also by Counsel for Respondent.

SMALLPAGE & MACOMBER,
Attorneys for Appellant.

[Endorsed]: Filed Aug. 26, 1944. Paul P. O'Brien, Clerk.

No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BALLEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S OPENING BRIEF.

**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

FORREST E. MACOMBER,

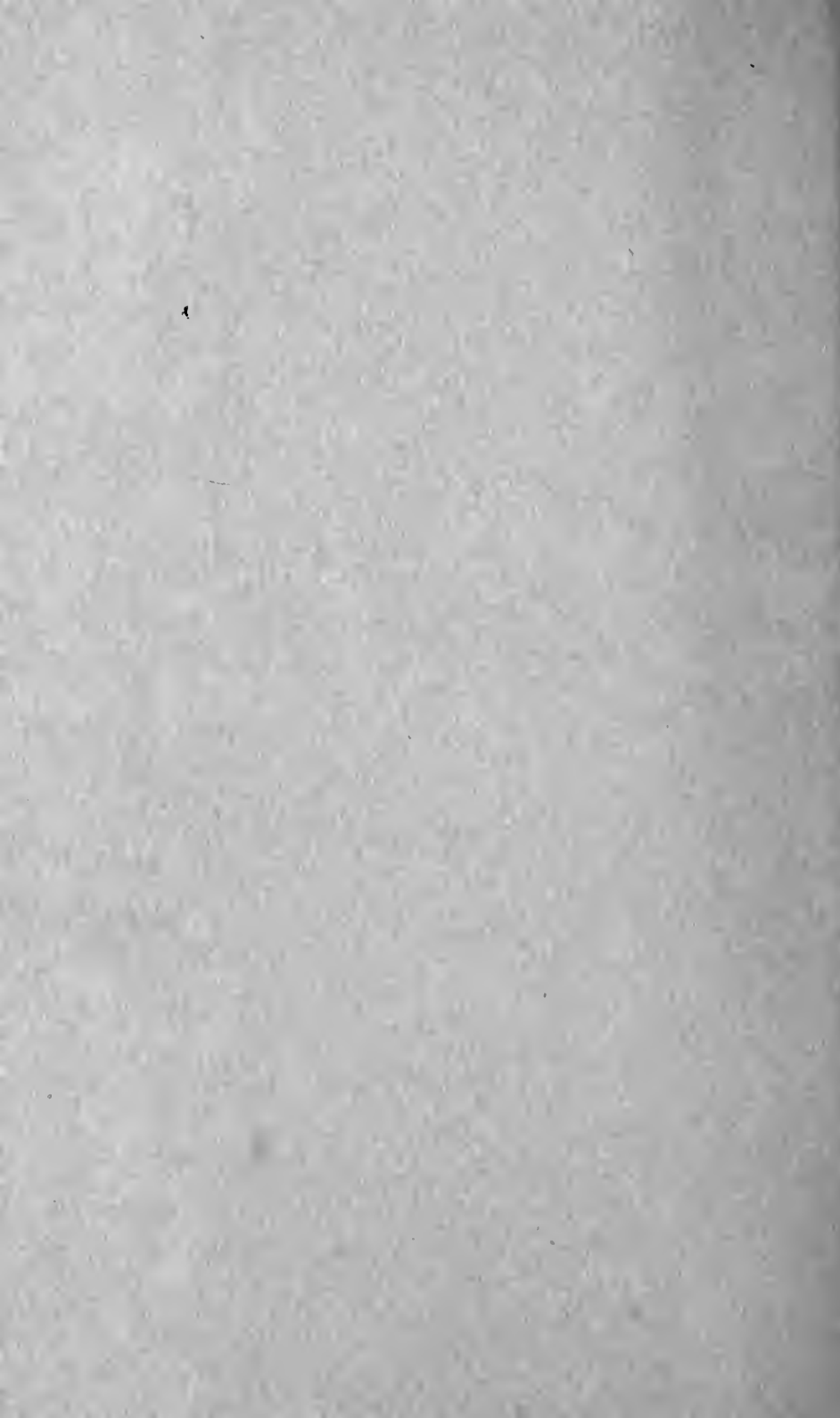
Stockton Savings and Loan Building, Stockton, California,

Attorneys for Appellant.

FILED

NOV - 8 1944

**PAUL P. O'BRIEN,
CLERK**



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No. 10,848

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

EMIL BALLEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S OPENING BRIEF.

**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

This is an appeal by defendant from a judgment of the United States District Court in and for the Northern District of California, Northern Division, in favor of plaintiff upon a trial *de novo* in said District Court following a reparation award in favor of plaintiff by the Secretary of Agriculture of the United States of America.

STATEMENT OF PLEADINGS AND PREVIOUS PROCEEDINGS.

This proceeding was originally instituted by Emil Balley through the filing of a formal complaint before the Secretary of Agriculture of the United States against the appellant, James Tozzi, to recover the sum of twenty-five hundred and no/100 (\$2500.00) dollars, together with interest thereon at the rate of six (6%) per cent per annum from April 6, 1940, together with damages in the amount of three thousand and no/100 (\$3000.00) dollars for alleged failure on the part of appellant, James Tozzi, to deliver to plaintiff, Emil Balley, thirty (30) carloads of potatoes at the unit price of one and 45/100 (\$1.45) dollars per cwt.

STATUTES INVOLVED.

The original complaint filed before the Secretary of Agriculture was based solely upon an alleged violation by appellant, James Tozzi, d/b/a James Tozzi & Company, of Subsection 2 of Section 2 of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940 Edition, 499(a)-499(r).) (Tr. pp. 2-7.)

The appellant, James Tozzi & Company, appealed from the reparation award of the Secretary of Agriculture to the United States District Court of the Northern District of California, Northern Division, under the provisions of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940

Edition, 499(a)-499(r)), and under the provisions of said statute, James Tozzi & Company was granted a trial *de novo* in said District Court.

The jurisdiction of the Secretary of Agriculture of the United States to hear the complaint is governed by the provisions of the "Perishable Agricultural Commodities Act of 1930 as Amended" (7 U.S.C. 1940 Edition, 499(a)-499(r)).

The jurisdiction of the United States District Court to hear said matter on trial *de novo* after reparation award made by the Secretary of Agriculture is likewise governed by the aforesaid statute.

The jurisdiction of this Court to review the decision of the United States District Court is governed by Section 128 of the Judicial Code as amended. (28 U.S.C.A. paragraph 225.)

STATEMENT OF THE CASE.

Plaintiff and respondent, Emil Balley, hereinafter designated Balley, filed a formal complaint before the United States Department of Agriculture on May 5, 1941, alleging that during the latter part of March, 1940, there had been a breach of contract for the sale by Tozzi & Company, hereinafter designated Tozzi, and the purchase by Balley of 10,851 sacks of potatoes grown, and allegedly sold, in Oregon by Tozzi to him. A hearing was had before the Honorable H. P. Dechant, examiner for the United States Department

of Agriculture, at Stockton, California, on March 18, 1942. Thereafter, on December 14, 1942, the Secretary of Agriculture made and entered his findings of fact, conclusions of law and reparation award in favor of Balley, against appellant, Tozzi. Tozzi appealed from the reparation award to the United States District Court, and, pursuant to law, was granted a trial "*de novo*" in said Court. At this trial, the parties offered no new testimony, but stipulated that the testimony offered to and received before the Department of Agriculture (subject to certain exceptions) should be considered in evidence before the District Court; upon this record, the case was submitted to said Court. In the District Court, as well as before the Secretary of Agriculture, the main issue of fact was this: Did the parties make a binding agreement as to price for the sale by Tozzi and the purchase by Balley of the potatoes in question? Plaintiff, Balley, claimed the price was \$1.45 per cwt. free of accrued storage charges; defendant, Tozzi, claimed that the price was \$1.45 per cwt. plus accrued storage charges of ten cents per bag. That issue of fact was resolved against appellant, Tozzi.

The issue of law—What is the measure of damages?—Appellant contended unsuccessfully both before the Secretary of Agriculture and the District Court that the rule adopted by them in assessing damages is not correct.

The finding of fact of the Secretary of Agriculture covering the damages is as follows:

FINDING OF FACT NO. 8—SECRETARY OF AGRICULTURE

“8. Subsequent to the respondent’s failure to perform under its contract with the complainant the respondent sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds, \$18,205.51. This was an increase of \$2,471.56 over the amount the respondent would have received had it not breached its contract with the complainant.” (Tr. pp. 36-37.)

The District Court, in rendering judgment in favor of plaintiff, Balley, followed the same rule for the measure of plaintiff’s damages, to-wit:

FINDING NO. 8

FINDING OF FACT—UNITED STATES DISTRICT COURT

“8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds \$18,205.51, being an increase of \$2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon.” (Tr. pp. 53-55.)

The conclusions of law of the United States District Court are as follows:

CONCLUSIONS OF LAW

“When the defendant and appellant refused to deliver the 10,851 sacks of potatoes because the plaintiff and respondent would not pay the storage charges, the defendant and appellant breached the contract entered into between the parties, and, there has been excluded from consideration herein the reports of W. A. Hilgeson and J. W. Dykes, containing as they do pure, hearsay evidence incompetent in a Court of Law, and the objections of the defendant and appellant thereto are hereby sustained, it being considered however that the greater weight of competent evidence, introduced herein by stipulation of the parties, does sustain the facts as found by the Secretary of Agriculture.

That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant \$2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of \$15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive \$2,500.00 from the plaintiff and respondent and \$18,205.51 from the purchaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total

sum of \$20,705.51, which represents receipts of \$4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the sum of \$4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of \$250.00 as attorney's fees, with costs taxed at \$10.00." (Tr. pp. 53-55.)

SPECIFICATIONS OF ERROR.

Appellant contends,

First, that the rule of measure of damages adopted by the Secretary of Agriculture and thoughtlessly acquiesced in or followed by the District Court is erroneous.

Second, that there was no evidence whatever before the District Court to support any finding of damages according to the correct rule thereof.

Third, that Finding No. 8 of the Findings of Fact of the District Court is not supported by the evidence in this: That the evidence actually shows that there was no net profit on the resale of the potatoes by Tozzi, but there was actually a net loss.

ARGUMENT.

On March 29, 1940, one "Streeter", acting as the agent for Tozzi at Malin, Oregon, orally quoted to plaintiff, Balley, the sum of \$1.45 per cwt. as sales price of 10,851 sacks of potatoes. At this time, the potatoes were in storage at Klamath Falls, Oregon, and the sum of ten cents per bag storage had already accrued. Later, Balley accepted the offer, but claimed storage was not mentioned.

Before the disagreement as to the storage arose, Balley had paid a deposit of \$2500.00 on account of the purchase price, and when the dispute arose, Tozzi's agent refused to deliver the potatoes to Balley unless he paid for the accrued storage of ten cents per bag.

The Secretary of Agriculture, as has been heretofore stated, resolved the dispute against defendant, Tozzi, and, in assessing damages against him, adopted the rule set forth as follows:

"* * * under these circumstances Complainant (Balley) became the equitable owner of the potatoes, and the Complainant may consider the Respondent's (Tozzi's) resale of the potatoes as having been made for Complainant's account. Therefore, the Complainant is entitled to receive from the Respondent any amount in excess of the contract price (\$15,733.95) received by the Respondent in connection with the particular lot of potatoes. The Respondent received \$2500.00 from the Complainant and \$18,205.51 from the purchaser on the resale, or a total of \$20,705.51, which represents receipts of \$4,971.56 in excess of the con-

tract price. The Complainant should, therefore, be awarded \$4,971.56 with interest. * * * (Tr. p. 38.)

Tozzi appealed, asserting before the District Court that the measure of damages in a case of this kind is the difference between the contract and the market price of the potatoes at the time and place when they should have been delivered; that there was no testimony whatsoever to show what, if any, damages had been sustained by Balley under this rule.

The District Court held on this point.

“OPINION AND ORDER

On the trial *de novo* of the claim of Emil Balley, the plaintiff and respondent, against James Tozzi, the defendant and appellant, for damages for breach of contract to sell to respondent 10,851 sacks of potatoes, I have weighed the evidence introduced before me to determine whether the plaintiff and respondent has established his claim by a preponderance of the evidence,—giving due regard, as required by statute, to the effect of the findings, conclusions and order of the Secretary of Agriculture as *prima facie* evidence of the facts therein stated. I have excluded from my consideration the reports of W. A. Hilgeson and J. W. Dykes, containing as they do, pure hearsay evidence incompetent in a court of law. And the objection of the appellant to the admission of these reports as evidence in this court is sustained. I am nevertheless satisfied from my examination of the competent evidence introduced

before me by stipulation of the parties filed herein, that the greater weight of the same is in favor of the facts as found by the Secretary of Agriculture; and his findings will therefore be those of this court with the following addition to the Secretary's Finding No. 8:—That the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon. My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law.

Judgment will be in favor of the plaintiff and respondent and against the defendant and appellant in the sum of \$4,971.56, with interest thereon at the rate of 5% per annum from April 6, 1940, until paid, together with the further sum of \$250.00 as and for counsel fees, and with costs.

Findings of Fact, conclusions of law and judgment shall be prepared, served and submitted by counsel for plaintiff and respondent, and counsel for defendant and appellant shall have five days thereafter within which to propose counter findings." (Tr. p. 47.)

Finding No. 8 of the Findings of Fact of the United States District Court reads as follows:

“8. That subsequent to the failure of the defendant and appellant to perform under its contract with the plaintiff and respondent, the defendant and appellant sold or disposed of the 10,851 sacks of potatoes and received therefor as net proceeds \$18,205.51, being an increase of \$2,471.56 over the amount the defendant and appellant would have received had it not breached its contract with the plaintiff and respondent; that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon.” (Tr. p. 53.)

The Conclusions of Law applicable thereto are as follows:

CONCLUSIONS OF LAW.

“That since the defendant and appellant breached its contract with the plaintiff and respondent by failing to deliver to the plaintiff and respondent the 10,851 sacks of potatoes, and, since the evidence shows that the plaintiff and respondent did everything that he was required to do under the contract, namely, that he paid to the defendant and appellant \$2,500.00 as part payment of the purchase price and tendered to the defendant and appellant the balance of the purchase price, the plaintiff and respondent is entitled to receive from the defendant and appellant any amount in excess of the contract price of \$15,733.95 received by the defendant and appellant in connection with the potatoes; that defendant and appellant did receive \$2,500.00 from the plaintiff and respondent and \$18,205.51 from the pur-

chaser on the resale, said resale price not exceeding the fair market value thereof on April 6, 1940, or a total sum of \$20,705.51, which represents receipts of \$4,971.56 in excess of the contract price; and that plaintiff and respondent is entitled to judgment against the defendant and appellant in the sum of \$4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, to the date of judgment to be entered herein, and thereafter at the lawful rate of interest, the additional sum of \$250.00 as attorney's fees, with costs taxed at \$10.00." (Tr. p. 54.)

It is finding No. 8 and the quoted paragraph of the conclusions of law to which appellant objects. We earnestly maintain that the rule of damages adopted by the District Court is wrong. It has no basis in law, and there is not one iota of testimony in the record which would sustain a finding of damages under the correct rule thereof.

We further maintain that with respect to finding No. 8 of the District Court findings, there is no testimony whatsoever to support that part of the finding:

"* * * that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." (Tr. p. 53.)

There is no testimony whatsoever in the record to show what the fair market value of potatoes was at Klamath Falls, Oregon, on or about April 6, 1940.

Even if we accepted the rule of damages followed by the District Court, Finding No. 8 on the issue of damages, which states that Tozzi received a sum of \$18,205.51 as net proceeds from the re-sale of the potatoes in question, is not supported by the evidence; the only evidence produced before the District Court shows that there was no net profit whatever realized on a re-sale of the potatoes by Tozzi, but a net loss.

THE LAW.

It has long been the law that the measure of damages for the failure to deliver goods is as follows, and we quote paragraph 67 of the Uniform Sales Act (Uniform Laws Annotated, Volume I, Sales, page 369):

“67. * * * (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

The Uniform Sales Act was adopted in Oregon, February 22, 1919. (Laws of 1919, Chapter 91; Oregon Laws 1920, paragraphs 8165-8241.) The same Act was adopted in California in 1931.

This section of the Uniform Sales Act is merely declaratory of the Common Law. (See Case Notes U.L. A., Vol. I, paragraph 67.)

In *Duncan Lumber Co. v. Willapa Lumber Co.*, 182 Pac. 172, 93 Ore. 386, the Supreme Court of Oregon states as follows, pages 175-176:

“* * * It is the settled law of this state, as conceded by the parties hereto, that the measure of damages for failure to deliver merchandise, in accordance with a contract of purchase, if the articles have a market value, is the difference between the contract price and the market value at the time and place of delivery.”

In *Watson v. Oregon Moline Plow Company*, 227 Pac. 278, 112 Ore. 414, the Supreme Court of Oregon again stated as follows, at pages 283-4:

“Upon the breach of a contract, the injured party is entitled to compensation for gains prevented and losses sustained. Where the contract which is broken provides for the sale of a commodity without more, the value of which commodity is fixed by free trading therein upon an open market, ordinarily the difference between the contract price and the market price thus established is the measure of such compensation in an action for damages brought by the buyer.”

To the same effect see *DeArmond v. Fenwick*, 272 Pac. 893 at p. 895, 127 Ore. 509, and *Wilson Motor Co. v. Lamping Motors, Inc.*, 78 Pac. (2d) 559, 194 Wash. 416.

This is likewise the rule in the Federal Court. See *Amr. Mfg. Co. v. U. S. Shipping Board*, 7 Fed. (2d) 565 (C.C.A. 2d Ct.).

The rule is well stated in a case decided in Pennsylvania, *Popkin Bros. v. Dunlap*, reported in 196 Atl. 586, 130 Pa. 50, which was an action to recover for potatoes sold and delivered. Judgment resulted in favor of defendant on his cross-complaint for damages for failure to deliver other potatoes, and on said cross-complaint and in said judgment on said cross-complaint the Court below fixed the measure of damages on the theory that the buyer was entitled to anticipated profits. The Appellate Court reversed the case and in doing so stated that the correct rule of damages is that defined in Section 67 of the Sales Act, as follows, quoted on page 588, supra:

“Third. Where there is an available market for the goods in question, the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

and again on page 589:

“Damages are not to be presumed, and the defendant will have the burden of proving just what damage he suffered as a direct and natural consequence of plaintiff’s alleged breach. *Seward v. Pennsylvania Salt Mfg. Co.* supra. ‘The object of the law is to compensate the party injured. He

is entitled to this, and nothing more, and in all cases compensation must be limited to the loss actually sustained.' ”

See also:

Bartolotta v. Calvo, 152 Atl. 306 (Conn. 1930),
112 Conn. 385;

*Benjamin Harrison Co. v. Western Smelting
and Refining Co.*, 40 NE (2d) 747 (Ill. 1942),
313 Ill. App. 455;

Seego v. Owen, et al., 26 NE (2d) 752 (Ill.
1940), 304 Ill. App. 594;

Marcus & Co. Inc. v. K.L.G. Baking Co., Inc.,
3 Atl. (2d) 627 (N. J. 1939).

In *Monaci v. Turner*, 37 Cal. App. (2d) 98, 98 Pac. (2d) 755, the Fourth District Court of Appeals of California reversed the case for the reason that the damages awarded by the trial Court were erroneous, and stated that:

“Plaintiff can only recover the differences in the contract price of the filter defendant agreed to make and the market value of one of the same general type and capacity. There is no evidence on the question of the similarity and market values of the filter defendant agreed to make and deliver and the West Coast filter purchased by Plaintiff.”

In *Smith v. White*, 48 Fed. Supp. 554 (1942), the facts were as follows: Plaintiff brought an action under the Perishable Commodities Act, 7 U.S.C.A., paragraph 499 (a) et seq., for the recovery of damages for breach of warranty of the quality of agri-

cultural products. Mr. Cornfield purchased from Mr. White four carloads of U. S. Grade No. 1, California Wonder Peppers, f.o.b. Crystal City, Texas. At Cornfield's direction three of the cars were shipped to Chicago and the fourth to Kansas City. Cornfield sold the peppers prior to arrival in Chicago and Kansas City as being of the grade noted. Upon arrival at Chicago the three cars were rejected on the ground that they did not meet the grade specified. The same thing happened to the car upon arrival at Kansas City. Cornfield, unable to sell the peppers on the open market at Chicago and Kansas City, sent them on to New York and sold them. The amount at which Cornfield had contracted the sale of his peppers was \$5967.60 and the total amount realized from the sale of the four cars was \$2901.41. Cornfield then filed claim for a reparation and was granted damages in the sum of \$3066.19, the difference between the price for which the peppers were actually sold and the price for which Cornfield had contracted to sell the same if they corresponded to the grade warranted. Cornfield assigned the payment to the present plaintiff who instituted this action in the District Court to enforce the collection of the claim. (The findings in the case of *Smith v. White* are very similar to the findings in the case at bar.) The District Court, in reversing the decision of the Secretary of Agriculture, and ordering judgment entered for the defendant, held on pages 556-7:

“Neither the findings of the Secretary or the additional evidence produced establish the fact that

the defendant was notified of the resale contracts or had actual knowledge of them. The theory of plaintiff's amended complaint was that such notice was given. Upon that hypothesis was predicated the assumption that the resale contract price would fix the value of the peppers purchased. By the amended complaint the defendant was informed that it would not be the difference between the market price of U. S. Grade No. 1 peppers and the market price of the peppers delivered which plaintiff sought to recover, but that the recovery sought was the difference between the resale contract price of U.S. Grade No. 1 peppers and the best price obtainable for the peppers shipped. That being the issue posed by the amended complaint the defendant could not be called upon to meet the issue relating to the market price of the commodity."

and later, on page 557:

"Such being the issue, may the plaintiff recover the difference between the resale contract price, regardless of market value, and the best price obtainable for the inferior products without bringing home to defendant knowledge of the resale contracts? The rule is well established that a special agreement made between the purchaser and a third party for the resale of goods may not be made the criterion of the value of the goods in an action by the purchaser against the seller for damages for non-performance unless the seller had knowledge of the special purpose for which the goods were being acquired, i.e. to fulfill the resale contract." (Citing cases.)

and again, on the same page:

“The finding of the Secretary therefore was wanting in an essential fact to plaintiff’s recovery which fact was not supplied by the supplementary evidence offered. Hence, plaintiff may not recover and the judgment must be for the defendant.”

As to the ability of plaintiff to purchase a like grade and quantity of potatoes at Klamath Falls, Oregon, the Court could, and should, take judicial notice of the fact that Klamath Falls is a potato raising center and shipping point, and just as nationally known as such as Riverside, California, as an orange center and Turlock, California, as a melon center; it would have been an easy matter for Balley to have shown the market value of these potatoes at Klamath Falls at the time of the breach. If that price were the same or less than the contract price, he sustained no damage whatever. If the market price were higher, he should prove that fact. We believe it significant that plaintiff has studiously avoided proving or attempting to prove the correct measure of damages, but instead has attempted to obtain a judgment based upon the gross profits which Tozzi realized on the sale of said potatoes at points outside of Oregon.

With respect to the damages awarded Balley by the District Court, it will be observed that in calculating the same the District Court took the sum of \$2500.00, part payment of the purchase price, and added to that the price at which Tozzi had re-sold the potatoes, to-

wit: \$18,205.51, making a total of \$20,705.51. From this total the District Court deducted the contract price of \$15,733.95, which left a balance of \$4971.56 in excess of the contract price. Finding of Fact No. 8 states that Tozzi received on the re-sale of the potatoes *net proceeds* of \$18,205.51. *There is no evidence whatsoever to support this finding. The sum of \$18,205.51 received by Tozzi on the re-sale of the potatoes was not net proceeds, but was gross proceeds.* The sole and only testimony bearing upon this point is that of Tozzi (Tr. page 98, line 7):

“Q. (by Mr. Smallpage). Now referring to Exhibit G, Mr. Tozzi, what was the total amount received from the sale of those potatoes?

A. \$18,205.51.

Q. And is that the same amount that the investigator Mr. Dykes ascertained?

A. Yes, sir.

Q. Now, I note that you have added \$2500, being the payment that you received from Mr. Balley; so that would make a total amount or \$20,705.51?

A. That is correct.

Q. Now you have some deductions?

A. Well, we paid the cold storage company \$1660.70.

Q. Attached to this Exhibit G the second page of it—

A. (interposing). Yes, the statement from the cold storage company.

Q. Now, your selling expense was how much?

A. Selling expense was 10 cents a sack, \$1085.10.

Q. And that left a net return of how much?

A. That left a net return of \$17,959.71.

Q. And less the cost of the potatoes?

A. Less the cost of the potatoes.

Q. That is what you had contracted with Mr. Balley?

A. \$15,733.95.

Q. Which leaves a net of what?

A. \$2225.76."

The net profit realized on the re-sale of these potatoes was \$2225.76, *which included the \$2500.00 down payment received from Balley, so that as a matter of fact, there was a net loss of \$274.24*; therefore, even if we accept the rule of the measure of damages laid down by the District Court, there was no net profit whatsoever, but a net loss, and for this reason the judgment should be reversed.

It is respectfully submitted that the judgment of the District Court should be reversed for the following reasons:

1. That the rule of measure of damages adopted by the District Court is erroneous and that there is no evidence whatsoever to show what, if any, damages were sustained by respondent Balley under the correct rule of damages.

2. That even under the incorrect rule of damages adopted by the District Court, the evidence fails to sustain the finding of that Court that there was a net profit realized by appellant Tozzi on the re-sale of the

potatoes, and that actually there was a net loss on such re-sale.

Dated, Stockton, California,
November 8, 1944.

Respectfully submitted,

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

FORREST E. MACOMBER,

Attorneys for Appellant.

No. 10848

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES TOZZI, doing business as James Tozzi & Co.,
Appellant,

vs.

EMIL BALLEY,
Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.

Hon. Martin I. Welsh, U. S. District Judge.

WILSON S. WILEY,
608 Medical Dental Building,
Klamath Falls, Oregon,
ATTORNEY FOR APPELLEE

FILED

1944

PAUL P. O'BRIEN,

CLERK

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES TOZZI, doing business as James Tozzi & Co.,
Appellant,

vs.

EMIL BALLEY,
Appellee.

Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.

APPELLEE'S STATEMENT OF THE CASE

The Secretary of Agriculture of the United States, under and by virtue of the provisions of the Perishable Agricultural Commodities Act, 1930, Docket No. 4010, after a formal hearing held on March 18-19, 1942, in Stockton, California, awarded the appellee, on December 14, 1942, as reparation, the sum of \$4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, until paid, for failure on the part of the appellant, James Tozzi & Co., to deliver to appellee, Emil Balley, 10,851 sacks of potatoes, of 100 pounds each.

The reparation order included an item of \$2500.00 that appellee had advanced to the appellant on the payment of the purchase price of the potatoes. The unit price of the potatoes was \$1.45 per cwt. The advance payment of \$2500.00 has never been returned to appellee. Appellant resold all of the potatoes to other parties for the total sum of \$18,205.51, or \$2471.56 in excess of the sum of \$15,733.95, the price agreed upon between the appellant and the appellee.

The item of \$2471.56 was included, with the advance payment of \$2500.00, in the reparation award, for the reason that the Secretary had found that the appellee had duly tendered to the appellant the full balance due on the purchase price agreed upon between the parties, and that appellee had otherwise fully performed his part of the agreement. Under such circumstances the Secretary found that the appellee had become the equitable owner of the potatoes, and was entitled to receive from the appellant the enhanced sum of money received by appellant on a resale of the potatoes, together "with interest thereon to date of payment," as provided in the Perishable Agricultural Commodities Act, 1930.

The order of the Secretary (R 39) provided that within thirty days from the date of the order the appellant pay to the appellee such reparation award. The Act provides that if such award be not paid within five days from the expiration of the period allowed for compliance with such order, or if no appeal be taken from such order, the respondent shall suffer an automatic suspension of his federal license to carry on interstate business.

Within the period allowed for compliance, however, the appellant did perfect an appeal in the District Court of the United States for the Northern District of California, Northern Division, at Sacramento, California. On November 17, 1943, a trial was had, based upon the record made before the Secretary of Agriculture as shown in the stipulation entered into between the respective parties (R 45-46). On June 6, 1944, the Court made and entered its Findings of Fact and Conclusions of Law, and, based thereon, entered judgment in favor of the appelle (R 49-56).

In substance the Court affirmed the Findings of Fact of the Secretary of Agriculture, with an additional finding in Finding No. 8: "That the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." The Court stated in its opinion (R 47-48): "My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law."

On June 10, 1944, the appellant filed in the District Court of the United States for the Northern District of California, Northern Division, a motion for a new trial (R 58). This motion was argued by respective counsel, and, on July 3, 1944, it was denied by the Court (R 59).

Notice of appeal to the Circuit Court of Appeals of

the United States, Ninth Circuit, was filed on July 12, 1944, accompanied by a corporate surety supersedeas bond, which bond was approved, on the same day, by Hon. Martin I. Welsh, United States District Judge (R 63).

A Statement of the points upon which the appellant intends to rely in this appeal appears in the Record on pages 63 and 64.

APPELLANT'S ASSIGNMENT OF ERROR NO. 1

ARGUMENT

The appellant contends that the judgment entered herein is against law in this:

“That the burden was upon plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that plaintiff could have sustained were measured by the difference between the price at which plaintiff agreed to pay defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940, in Klamath Falls, Oregon (R 101).”

In this assignment of error the appellant has designated the potatoes as “seed potatoes,” and has also made the statement that the time of sale was “April 16, 1940.” The fact, which we believe will be admitted, is that this controversy has arisen over the

sale of cold storage potatoes and not seed potatoes, and that the time for the delivery of the potatoes was on April 6, 1940, and not on April 16, 1940. Doubtless these errors have crept into the assignment of error through inadvertence.

The record shows that the potatoes were stored in an ice cold storage plant in Klamath Falls, Oregon (R 9), and that they were to be delivered f. o. b. at Klamath Falls on April 6, 1940 (R 69), and that "we will meet the latter part of the week for payment, which was April 6th (R 70)."

On March 29, 1940, the appellee agreed to pay to the appellant the sum of \$15,733.95 for the 10,851 sacks of potatoes, and on that day did pay to the appellant's agent the sum of \$2500.00 as an advance payment on the purchase price thereof (R 68).

On April 6, 1940, both the appellee and his attorney, Clarence A. Humble, offered to pay to the agent of the appellant the balance due, to-wit: \$13,233.95, on the purchase price of the potatoes, and, on the same day, the appellant's agent "hollered, 'Well, I am keeping the \$2500.00 and I am handing it over to my attorney (R 71),' " because appellee had refused to pay appellant's storage debt. On April 6, 1940, the appellee wired to the appellant that he was ready, on this day, to pay the agreed price at the rate of \$1.45 per sack for the potatoes (R 72).

Since it appears that the time and place for the consummation of the sale and delivery of the potatoes was on April 6, 1940, at Klamath Falls, Oregon, let us examine the record in order to determine

whether any evidence was adduced by either the appellee, appellant, or both, tending to establish the value of a like grade of potatoes as of that time and place.

The appellant himself testified that "the market started showing strength" after March 15, 1940 (R 97), and also that "in fact, I think it could be verified by government reports that the market advanced between 10 to 25 cents (R 98)," doubtless meaning "to 25 cents" on April 6, 1940, the time set for the delivery of the potatoes and payment therefor. Here the appellant cited, for his authority, the government of the United States, as to market value. He also cited, for his authority, his agent, when he quoted his agent saying: "the market had advanced fully a quarter," and that the "market had advanced 15 cents or a quarter (R 99)."

The plain inference to be drawn from this evidence is that the market "of a like grade of potatoes" had advanced from \$1.45 per sack, during the latter part of March, 1940, "fully a quarter," "or a quarter," or from \$1.45 per sack to \$1.70 per sack, by April 6, 1940, when, as Mr. Humble testified, on that date "the thing just kind of blew up and everybody walked away" (R 95).

The findings of both the District Court of the United States for the Northern District of California, Northern Division, and the Secretary of Agriculture of the United States, were to the effect that the appellee had contracted to purchase the potatoes for \$1.45 per sack from the appellant, and if the market value of a like grade of potatoes on April 6, 1940, was

fully a quarter in excess of that price, or \$1.70 per sack, then the market value of 10,851 sacks of a like grade of potatoes on April 6, 1940, was \$18,446.70, according to appellant's own testimony, or \$241.19 in excess of the amount of \$18,205.51 the amount received by appellant on a resale of the 10,851 sacks of potatoes (R 98).

In addition to this evidence as to market value of a "like grade" of potatoes, in Klamath Falls, Oregon, as of April 6, 1940, brought forward by the appellant, the appellee testified as to the market value of a like grade of potatoes. The appellee testified that "this type of potatoes are selling from \$1.75 to \$2.00" (R 89).

On cross examination the appellee had been asked the question as to whether these potatoes were designated as "Klamath U. S. No. 1 russets," and he replied in the affirmative. When the appellee used the expression "this type of potatoes," obviously he meant a "like grade of potatoes."

Tozzi, Streeter and Balley had all been engaged in the business of buying and selling potatoes commercially. All agreed that the market had been advancing, and, as a part of their duties, they should have been conversant with market conditions. The appellee testified that the market started jumping "right around March 20th on through there (R 89)."

Dunbar McManus Company was willing to pay \$2.00 per cwt. for some of the potatoes, delivery not to be made "until right around May (R 90)," and that if the appellee had to withhold shipment to that com-

pany "one day after May 1st" he would have had to pay 10 cents on all of the potatoes (R 91). Appellee had been advised that this company could handle "some of the potatoes;" that this company would "buy them outright," and pay \$2.00 per sack for the lot to be acquired by it, f. o. b. Klamath (R 90).

Counsel for appellant sought to draw unfavorable inferences from the fact that appellee in some preliminary correspondence had been quoting various prices to various parties. Irrespective of these rising market conditions the appellee had a contract with the appellant for the payment of \$1.45 per cwt.

Q. Why did you make the statement then to your distributors that you could not get potatoes less than \$1.45 to \$1.55 naked, which, putting it on a parity with the Streeter potatoes, would amount to \$1.55 to \$1.65?

A. Well, when you taper down at Klamath Falls to about four or five growers, they will hold what they want—they will take the best and hold them for the best price. Why should I worry if I cannot get potatoes at \$1.45 or \$1.55; I had an agreement at that time with Mr. Streeter. (R 85).

Appellee testified that he had communicated with the United Brokers of Portland, Oregon, Dunbar McManus Company of San Francisco, and the L. A. Potato Distributors, Inc., of Los Angeles, with a view to selling these potatoes (R 73).

Q. Had you got to the point where you had quoted a price to them (R 75).

A. Yes, I had quoted a price; I had quoted a price

to Dunbar McManus and also L. A. Potato Distributors.

Q. What price did you quote to those parties?

A. I quoted a price of \$2.00 f. o. b.

Q. Did either one of them accept this offer?

A. L. A. Potato Distributors accepted the quoted price.

Q. What price did you say?

A. \$2 f. o. b.

Q. F. o. b. where?

A. Klamath Falls.

Q. That is in the State of Oregon, isn't it?

A. Yes (R 76).

Q. Had you sold these parties potatoes previously (R 77)?

A. Yes, I had.

* * *

Q. Had they furnished you with draft books (R 77)?

A. Yes, they have furnished me with draft books.

Q. (By Mr. Wiley) They had furnished you with blank forms of drafts to draw on them?

A. Yes.

Q. In shipping potatoes to them?

A. Yes (R 77).

Los Angeles Potato Distributors, Inc. agreed to pay \$2.00 per cwt. for the 30 carloads of potatoes f. o. b. Klamath Falls, Oregon.

It was on March 29, 1940, according to Mr. Streeter's sworn statement (R 99), that appellee entered his office very hastily and asked him if he had sold the cold storage potatoes that he had previously shown him. The appellee told Mr. Streeter that he had to have "this lot somehow."

This conversation would indicate that the appellee, on that date, had in his possession the order of March 25, 1940 (Exhibit 10, R 94). It is not unreasonable to suppose that the appellee would not disclose the contents of such order to Mr. Streeter. Appellee had an acceptance of his offer to the Los Angeles Potato Distributors, Inc., of \$2.00 per cwt. f. o. b. Klamath Falls. Hence, in order to fulfill his commitment it became of primary importance to appellee that he acquire "this lot somehow." Appellee could not very well have obligated himself for the payment of 10,851 sacks of potatoes without first having obtained a buyer. The appellee testified that the Los Angeles Potato Distributors, Inc. accepted the quoted price of \$2.00 per cwt. f. o. b. Klamath Falls (R 75).

Appellee appears to have concentrated his efforts in making a resale of the potatoes, all of the thirty carloads, to the Los Angeles Potato Distributors, Inc. Appellee had quoted this company a price of \$2.00 per sack by telephone, which telephonic offer had

been confirmed in writing by letter, dated March 25, 1940, Exhibit 10, which is as follows (R 94) :

Regarding the fancy sandland potatoes you bought and have stored in the ice house. I was thinking if you wanted to turn them we could buy 20 cars or all of them if you care to turn loose at this time at \$2.00 f. o. b. the price as per our telephone conversation.

I would like to leave them there for a while and take them as we need them. We could pay you half down and the balance when you load out the cars.

I feel that we are taking a chance in buying so many at this price, but believe like you do that the market is going up and we are apt to make some good money on these providing they are as fancy as you say they are.

We have bought several cars from you already and you certainly know quality, so we are trusting that these potatoes you have stored are as good as what you have been sending us.

Please let us hear from you immediately. You had better get me on the phone tonight and let me know if you care to sell us these potatoes.

Appellee had been telephoning and corresponding with the Los Angeles Potato Distributors, Inc. in connection with a resale of the potatoes up to April 6, 1940, and considered that he had the potatoes "on contract" of sale with this company, as will appear from the following testimony, given on cross examination :

Well, on those potatoes there, that deal, as I say,

I think it was the 3rd of April when I contacted Mr. Streeter, the storage deal arose, and all this time I was telephoning and corresponding with L. A. Potato Distributors of Los Angeles, and there was at that time potatoes on contract and I had this deal going through and it was a good deal; it looked good to me. I had them pretty well sold, and I would have made some good money; so I figured this deal was going through, that is all. (R 83-84).

That the appellee was concentrating on closing a deal with the Los Angeles Potato Distributors, Inc. for the sale of the potatoes is strengthened by the fact that he apparently showed this order (Exhibit 10) to the banker when making arrangements to borrow money for the purchase of the Tozzi potatoes.

The banker, Mitchell Tillotson, in his deposition (R 96) testified:

“He told me he had purchased potatoes from Mr. Tozzi and that the potatoes were sold to the Los Angeles Potato Distributors, or Ross Phillippi. We agreed with Mr. Balley we would honor his draft on that order, against the Los Angeles Potato Distributors, for the shipment he made to them; we agreed we would honor his draft on Ross Phillippi or the United Brokers—whichever he was drawing on—to the extent of one car at a time, and that car should be paid for before further drafts were honored.”

Q. Let's come back to March, 1940; what type of document did you have from the Los Angeles Distributors guaranteeing the payment of drafts drawn on them by Mr. Balley?

A. We had an order or, he had an order from

them for the potatoes. (Underscoring supplied).

Q. You mean, an individual lot of potatoes; is that right?

A. An individual lot or whatever lot they ordered.

Furthermore, the Los Angeles Potato Distributors, Inc. had forwarded to the appellee a form of agreement to be used by appellee in the preparation of a form of contract to be signed by himself and the appellant when purchasing the potatoes from the appellant.

The appellant's agent refused to sign such a form of agreement when presented to him by the appellee, the appellee (R 70) testifying:

Yes, it was a form that the Zuckerman & Company prepared, and it was sent by the L. A. Potato Distributors of Los Angeles, California, one of their contract forms. I drew this myself from that form.

On April 3, 1940, the appellee testified that the appellant's agent had for the first time introduced the question of the payment by the appellee of the accrued storage debt of the appellant. This demand doubtless caused the appellee considerable anxiety, and on the following day, April 4, 1940 (R 83), notified the Los Angeles Potato Distributors, Inc. of the demand so made. Appellee didn't believe he was obligated to pay the appellant's storage debt, but, apparently, desired to know the attitude of his customer on this controverted question over a transaction that

the Los Angeles Potato Distributors Inc. was directly interested in.

On page 13 of his opening brief appellant quotes from the Uniform Sales Act to the effect that :

“the measure of damages * * * is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

Appellee has no quarrel with the appellant over this general doctrine. Appellee approves of this principle of law in support of the facts in this case.

As of April 6, 1940, at Klamath Falls, Oregon, as heretofore shown, the appellant in substance testified that the market value of 10,851 sacks of a grade of potatoes like those involved herein was \$18,446.70, computed on the basis of \$1.70 per cwt., which amount is in excess of \$18,205.51, the sum found by the District Court to be not in excess of the fair market value of the potatoes at the time and place above mentioned. The appellee opined that the market value of “this type of potatoes” was from \$1.75 to \$2.00 per cwt. (R 89), and has been shown that the appellee had “on contract” the sale of the thirty carloads of the potatoes to the Los Angeles Potato Distributors, Inc., at \$2.00 per cwt. f. o. b. Klamath Falls, Oregon, as of April 6, 1940.

As late as April 4, 1940, the appellee complained to the Los Angeles Potato Distributors, Inc., that the appellant was seeking to force him to pay the accrued

storage debt of the appellant, and if appellee had received word from this company prior to April 6, 1940, that it was cancelling, or attempting to cancel the order, there would be little likelihood that on April 6, 1940, appellee would be wiring to the appellant insisting that the contract had with the appellant's agent be performed in accordance with his understanding of the transaction. This offer and acceptance, confirmed by Exhibit 10, relating to the sale of the thirty carloads of potatoes destined for shipment from Klamath Falls, Oregon, to Los Angeles, California, remained unchanged and in effect as of April 6, 1940.

Bearing upon the question of the fair market value, appellant cites a number of authorities on the general principle concerning various combinations of circumstances, on pages 14-19 of his opening brief.

The first,

DUNCAN LUMBER CO. v. WILLAPA LUMBER CO., 182 PAC. 172, 93 ORE. 386,

which case affirms the general principle announced in the Uniform Sales Act previously quoted. However, the decision in this case turns on a point of law, not involved herein.

The second,

WATSON v. OREGON MOLINE PLOW COMPANY, 227 PAC. 278, 112 ORE. 414,

While in substance approving the doctrine quoted in

the Uniform Sales Act, involves facts and principles of law unimportant in the consideration of the instant case. In this case the plaintiff sought to recover lost profits equal to the amount of the commissions it might have earned upon the sale of ten tractors. It appeared however in this case that the loss of profits or commissions did not necessarily result from a breach of contract, and that a claim for losses of that character is one for special damages, the facts concerning which should have been specifically pleaded.

The last case cited,

SMITH v. WHITE, 48 FED. SUPP. 554,

appears to be not in point. The peppers in that case, upon arrival in Chicago, did not meet the grade specified. In the instant case there is no issue as to grade or quality. The purchaser in that case accepted delivery and notified the seller he would sell the peppers for the best price obtainable, thereby giving the seller no opportunity, upon rejection, to sell them at the prevailing fair market price. Had the seller been given such opportunity, he might have been able to mitigate the damage. In this case the peppers were delivered to the buyer. In the instant case the potatoes were not delivered to the buyer. Here the appellee never had an opportunity to deliver any potatoes to any one, because the seller refused possession to him.

On page 19 of his opening brief, appellant says:

As to the ability of plaintiff to purchase a like grade and quantity of potatoes at Klamath Falls, Oregon, the Court could, and should, take ju-

dicial notice of the fact that Klamath Falls is a potato raising center and shipping point, and just as nationally known as such as Riverside, California, as an orange center and Turlock, California, as a melon center; it would have been an easy matter for Balley to have shown the market value of these potatoes at Klamath Falls at the time of the breach.

Is it not a complete answer to point out here that the appellee had an acceptance of his offer of \$2.00 per sack as of April 6, 1940, at Klamath Falls, Oregon, from the Los Angeles Potato Distributors, Inc.? Appellee was to pay the appellant the balance of the purchase price on April 6, 1940, and appellee expected to accept delivery of them, for shipment to Los Angeles, at Klamath Falls, Oregon, on April 6, 1940. Appellee would have been entitled to immediate delivery upon payment of the balance due on the purchase price.

When the appellant testified that the potatoes were worth fully a quarter above the price of \$1.45 per cwt. he could have been testifying only as to value on April 6, 1940, at Klamath Falls, Oregon, because that is the location of the place where he had them stored, and it was on this day that the appellant's agent repudiated the agreement had with the appellee.

It is not altogether clear the appellant is endeavoring to raise the point that it became the duty of the appellee to buy "a like grade and quantity of potatoes" elsewhere upon the refusal of appellant to deliver the thirty carloads of potatoes to appellee. If so we cite the case of *Duncan Lumber Co. v. Willapa Lumber Co.*, 182 Pac. 172, 93 Ore. 386, as our authority.

The defendant in this case had agreed to sell to the plaintiff Spruce lumber at \$42.00 per thousand feet f. o. b. Chicago. The defendant failed to deliver some of the lumber, and plaintiff purchased it elsewhere for \$61 and \$66 per thousand feet. There was evidence that at the time set for delivery the market value was \$75.00 per thousand feet. At \$75.00 per thousand feet, plaintiff would have suffered a loss of \$11,928.18, but he lost actually only \$7,520.27 by having been able to purchase the lumber from another source for prices under \$75.00 per thousand feet.

The Court held that while the plaintiff was not required to go into the market and purchase the goods elsewhere, before bringing his action, he may, if he sees fit, do so, and if, in a successful effort to minimize the damage, he incurs expense, he is entitled to recover such expenditures as an element of damage, so long as the total recovery does not exceed the difference between the contract price and the market price of the merchandise which the defendant failed to deliver in accordance with the terms of his agreement.

“Value” in its nature is rather vague; hence the rule for opinion testimony.

“Market value of property, when used in the same sense as “value” is price property will bring in cash when offered for sale by one desiring to sell, but not obliged to sell, and bought by one desiring to buy, but under no necessity to do so. The word “value” usually signifies “market value,” the terms being used interchangeably, and both are equivalent to “actual value” and

“saleable value.” *Taylor County v. Olds*, Tex. Civ. App. 67 S. W. 2d 1102, 1103.

Southern Traction Co. v. Hulburt, Tex. 177 S. W. 551, 555.

Lawrence v. City of Boston, 119 Mass. 126, 128, 129.

In Oregon Code, Section 17-167, Oregon Compiled Laws Annotated, the expression “market or current price” is used.

Owing to the great variety of circumstances concerning which the term “market price” is to be considered, it has been said courts are not inclined to adhere to too literal a meaning of the term.

“The word ‘market’ as used in the term ‘market price’ has not any fixed legal significance. The term ‘market price’ has no hard and fixed meaning. It has not a fixed and definite meaning which must attach to it invariably, in whatever contract it may occur, irrespective of the context or the surrounding circumstances. There is no magic in the term. When the term becomes a subject of legal controversy, it will be given that meaning which will best serve the purpose and intent of those who use it. The term has been variously defined as the actual price at which a commodity is commonly sold; the best price the owner could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; the current price; the general or ordinary price for which property may be bought and sold; the fair value of the property as between one who desires to purchase and one who desires to sell; * * * the price at which willing sellers are ready to take, and willing buyers

are ready to give; * * * the rate at which a thing is sold. * * * 38 C. J. 1261.

“‘Market value:’ ‘the fair value of the property as between one who desires to purchase and one who desires to sell.’” 38 C. J. 1262.

APPELLANT'S ASSIGNMENT OF ERROR NO. 2

ARGUMENT

Appellant's assignment of error No. 2 is as follows:

That the evidence was insufficient to justify the judgment in this: that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

We believe that the evidence cited in our argument in opposition to appellant's assignment of error No. 1 completely refutes the appellant's contention in his assignment of error No. 2. The admitted facts are that appellant agreed to sell and deliver 10,851 sacks of potatoes to the appellee for the sum of \$15,733.95; that appellant refused to make delivery to appellee, after retaining the down payment of \$2500.00 on the purchase price. Appellant later resold the potatoes to third parties for a sum of \$2471.56 in excess of the agreed price with appellee, to-wit: \$15,733.95. And furthermore the appellee had a written order from the Los Angeles Potato Distributors, Inc. to purchase the potatoes from the appellee for the unit price of \$2.00 per cwt. f. o. b. Klamath Falls, Oregon (R 94),

which unit price is in excess of the unit price of \$1.45 per cwt. quoted to appellee by the appellant. Does not this "difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale" measure the damage that appellee sustained?

The amount of damages awarded to the appellee both by the United States District Court, and the Secretary of Agriculture, comprised two items, to-wit: The advance payment of \$2500.00 on the purchase price, the payment of which is uncontradicted by the appellant, and the sum of \$2471.56 received by appellant on a resale to third parties in excess of the amount under contract of sale to appellee.

The Secretary of Agriculture held (R 38) :

Under these circumstances the complainant became the equitable owner of the potatoes, and the complainant may consider the respondent's resale of the potatoes as having been made for complainant's account. Therefore, the complainant is entitled to receive from the respondent any amount in excess of the contract price (\$15,733.95) received by the respondent in connection with the particular lot of potatoes.

Enhanced Price and not Net Profits to be accounted for

We submit that this is a fair statement of law, and affords an additional ground for recovery by the appellee.

Enhanced price secured by sale of property to third person in violation of contract, seller's duty to account for. 25 A. L. R. 1090.

In case of Phez Co. v. Salem Fruit Union et al, 201 Pac. 222 (Oregon case), this principle was announced :

“But taking the allegations of the complaint to be true, the growers who signed Exhibit C should account to plaintiff for the difference in the price of berries sold to other parties and 3½ cents per pound, the contract price mentioned in Exhibit C.”

The growers in this case sold their loganberries to parties other than the Phez Company through the union, on the ground, as claimed, that they had been released from their contract obligations because of the fact that the plaintiff, and union, had mutually cancelled the agreement of one of the growers.

The Court found that the growers each had separately agreed to sell their loganberries, through the union, to the Phez Company, hence no pool in the strict sense, there being no covenant binding the growers to each other, and the release of one individual grower could not affect in any way the contract between other growers and the union. The growers in this case breached the agreement on the mistaken notion that the plaintiff and union had violated the so-called pool agreement by consenting to the release of one of the growers.

In the instant case the appellant breached the contract to sell the potatoes to the appellee on the unsubstantiated ground that the appellee had violated the

agreement by refusal to pay the storage debt of the appellant.

Statute of Frauds

In passing it will be noted that there was no document in writing offered in evidence obligating the appellee to pay the accrued storage debt of the appellant. Statute of Frauds, Sec. 2-909, Oregon Compiled Laws Annotated.

“The plaintiff, not having offered such writing, was without legal or competent testimony to sustain his allegation that the defendant assumed the obligation of Hopkins and agreed to pay the same.” *Turnham v. Calumet & Oregon Mining Company*, 112 Pac. 711.

F. O. B. Defined

However, appellee contends there was no oral agreement to pay the accrued storage debt of the appellant. This contention is confirmed by the fact that all of the invoices (R 9-23) show that the price was \$1.45 per sack, f. o. b. Klamath Falls, Oregon.

The abbreviation ‘f. o. b.,’ for ‘free on board,’ used in the sale of goods, denotes the duty of the seller to deliver them free from all charges on board the vehicle or vessel of the carrier. *Harmon v. Washington Fuel Co.*, 81 N. E. 1017, 1019, 228 Ill. 298.

The abbreviation ‘f. o. b.,’ has a well defined business meaning, and, applied to the sale of merchandise destined for shipment, means that

it will be placed on a car or vessel free of expense to the buyer. *Manganese Steel Safe Co. v. First State Bank of Peola*, 125 N. W. 572, 573, 25 S. D. 119.

When Secretary of Agriculture found that there was damage to a specified extent, prima facie that damage is shown

The Perishable Agricultural Commodities Act, 1930, authorizing a trial de novo in the District Court of the United States, in the nature of an appeal from the proceedings, findings and order of the Secretary of Agriculture, provides, in part, that:

“Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima facie evidence of the facts therein stated.” (underscoring supplied) Title 7, U. S. C. A. p. 226.

The “Proceedings, Findings of Fact, Conclusions, and Order” were duly filed with the Clerk of the District Court of the United States for the Northern District of California, Northern Division, in accordance with the provisions of that Act (R 31-39).

Unless overcome by evidence to be brought forward by the appellant these “Findings of Fact” become the established facts, and the order a conclusive order, since the “finding of the amount of damages” is the “finding of ultimate fact.”

No evidence, other than that offered before the deal with the Los Angeles Patoto Distributors, Inc. Secretary of Agriculture, was produced in the District Court of the United States.

Only a limited number of court decisions have been found interpreting the Perishable Agricultural Commodities Act, 1930, but there are numerous decisions interpreting the Interstate Commerce Act, in which is expressed a procedure for court action similar to that found in the statute involved herein.

In order to show the similarity of these respective provisions of law, we quote from both of these enactments.

Perishable Agricultural Commodities Act, 1930:

“Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney’s fee to be taxed and collected as a part of his costs.” Title 7, U. S. C. A. p. 226.

Interstate Commerce Act:

Such suit “shall proceed in all respects like other civil suits for damages, except that on the trial of such a suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the peti-

tioner shall not be liable for costs in the district court nor for the costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be fixed and collected as a part of the costs of the suit."

It would therefore seem proper to quote court decisions interpreting this portion of the Interstate Commerce Act as applicable to the similar portion of the Perishable Agricultural Commodities Act, 1930.

In the case of *Cincinnati, N. O. and T. P. R. Co. v. Interstate Commerce Commission* (Ga. 1896) 162 U. S. 184 (Title 49 U. S. C. A. p. 49) it was held that "the findings of fact by the Commission were, however, merely prima facie proof of the facts found, and could be overcome of other evidence." It is submitted that this expression can not mean "overcome by the same evidence." (underscoring supplied).

"The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission* (La. 1907) 206 U. S. 441, 27 S. Ct. 700, 51 L. Ed. 1128.

It was held in the case of *Barker-Miller Distributing Company v. Berman*, 8 F. Supp. 60, No. 823 A, District Court, W. D. New York, involving the Perishable Agricultural Commodities Act, that:

"Defendant can not attack the findings made by the Secretary on the basis of the evidence

presented before him, particularly when the record of such evidence is not before the court. * * *

“The present proceeding is not in the nature of an appeal from or review of that determination. It is a proceeding *de novo*, but, by virtue of the statute, the *prima facie* case made out by the findings and order of the Secretary of Agriculture will prevail unless overcome by evidence submitted by defendant.” (underscoring supplied).

In action to recover award of Interstate Commerce Commission, hearing is *de novo*, but *prima facie* case made out by findings and order will prevail unless overcome by evidence. *Blair v. Cleveland C., C. & St. L. Ry. Co.* (D. C. Ill. 1931) 45 F. (2d) 792.

Under this section carriers have burden of bringing forward evidence to overcome presumptions created against them. *Baldwin v. Scott County Milling Co. Mo.* 1939, 59 S. Ct. 943.

“The Commission if it determines that any party is entitled to an award of damages under the provisions of the Act, shall make an order directing the carrier to pay to such party the sum to which he is entitled, and that, if the carrier does not comply with such order, any person for whose benefit such order was made may file in the federal court a petition setting forth the cause of action and the order of the Commission. The Act further provides that such suit shall proceed in all respects as other civil suits for damages, except that on the trial the findings and orders of the Commission shall be *prima facie* evidence of the facts therein stated. There is a further provision that, if the petitioner prevails, he shall be allowed to recover reasonable

attorney fees to be taxed and collected as a part of the costs. * * *

It may be that certain of that testimony is incompetent, and that certain comparisons claimed to have been relied upon by the Commission were improperly considered, but there is sufficient evidence competent in character to sustain the findings and order.

Defendants contend that there is a variance between the proof and the allegations of the petition * * *

I am of opinion that the Commission was not bound by the strict rules governing common-law proceedings, and had a right to make the order of reparation to the parties who were entitled to recover, irrespective of any technical variance between the proof and the allegations in the petition before the Commission.

Interstate Commerce Commission is not bound by technical rules in receiving and giving effect to weight of evidence, and its orders are not invalidated by its refusal or failure to adhere to strict rules of evidence obtaining in courts." *Montrose Oil and Refining Co. v. St. Louis-San Francisco Ry. Co.* (D. C. Texas 1927) 25 Fed. (2d) 750, affirmed (C. C. A. 1928) 25 Fed. (2d) 755.

"The Interstate Commerce Commission is not to be regarded as having acted arbitrarily in making a reparation order, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence introduced without objection and substantially corroborated by original evidence clearly admissible against the parties to be affected was considered with the rest." *Spiller v. Atchison, etc. R. Co.* (Ms.

1920) 253 U. S. 117.

In view of the foregoing it would seem that the appellee is entitled to an affirmance of the judgment, and reparation order of the Secretary of Agriculture, on the ground that the appellant has not brought forward any evidence to overcome the presumptions created against him.

The appellant is reasserting his disagreement with the conclusions reached by the Secretary of Agriculture on the record as made, which conclusions were upheld by the District Court, and asking for a reversal as though this proceeding was one of strict appeal notwithstanding the provision of the statute to the effect that the findings of fact and order shall be *prima facie* evidence of the facts therein stated.

Should the appellant be permitted to retain this excess sum of \$2471.56 it seems to us he would be enabled to unjustly enrich himself through his own wrongful act.

The Secretary of Agriculture found as an ultimate fact that the appellee had been damaged to that extent, in addition to the sum of \$2500.00 down payment being withheld by appellant.

“But when the Commission found that there was damage to a specified extent, *prima facie* that damage is shown.” *Mills v. Lehigh R. R.* 238 U. S. 473.

We respectfully submit that such damage was not so found on an improper basis. The finding is supported in this case not only on the theory of the dif-

ference between the fair market value of the commodity and the contract price, but also under the rule of law that the seller must account to the buyer for any sum of money received from third parties in excess of the contract price had with the original buyer.

“The prima facie presumption as to the correctness of the findings of facts by the commission includes a finding as to the amount of damages suffered by the complainant, where there is nothing in the report to show that such damages were assessed on an improper basis.” *Meeker v. Lehigh Valley R. Co.* (Pa. 1915) 35 S. Ct. 328, 236, U. S. 412, 50 L. Ed. 644.

“And where the Commission makes an award ‘as reparation’ this is a sufficient finding as to the ‘damages’ suffered by the complainant to make it prima facie evidence of the damages in an action to enforce the award. *Mills v. Lehigh Valley R. R.* (Pa. 1915) 238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414, reversing (1913) 207 F. 717, 125 C. C. A. 235, wherein Mr. Justice Hughes says: ‘When the Commission made the award ‘as reparation’ they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as we held in the second *Meeker Case*, a finding of the amount of damages as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid ‘as reparation’ on the specified shipments was the amount which they found necessary to accomplish the reparation—to af-

ford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damages is enough to give the order of the Commission effect as prima facie evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, prima facie the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

APPELLANT'S ASSIGNMENT OF ERROR NO. 3

ARGUMENT

Appellant contends:

That the findings of fact and conclusions of law herein are not supported by the evidence in this; that there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

We respectfully submit that a complete answer to such contention has been shown in appellee's argument in rebuttal to appellant's contentions under both assignments of error Nos. 1 and 2.

It will be observed that the District Court of the United States for the Northern District of California, Northern Division, merely found, in its Finding No. 8, "that the sum of \$18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon (R 53)."

It was held in *Dean v. Hayes*, 157 Pac. 558, 29 Cal. App. 689, that "a finding that the value of the land did not * * * exceed the sum of \$500.00" was sufficient in law.

Whereas, in the instant case the Court gave the appellant the benefit of the contention in not awarding to the appellee necessarily the full amount of the damage that might have been sustained by the appellee in holding that the "sum of \$18,205.51 did not exceed the fair market value of the potatoes," implying that the fair market value of the potatoes could be reasonably some amount in excess of \$18,205.51.

Net Proceeds

Appellant argues, on page 20 of his opening brief, as follows:

"Finding of Fact No. 8 states that Tozzi received on the re-sale of the potatoes net proceeds of \$18,205.51. There is no evidence whatsoever to support this finding. The sum of \$18,205.51 received by Tozzi on the re-sale of the potatoes was not net proceeds, but was gross proceeds."

On page 19 of this brief appears the following:

“gross profits which Tozzi realized on the sale of said potatoes at points outside of Oregon.”

Whether such proceeds be designated as “gross” or “net” is of less importance than the fact that after the re-sale of the potatoes so much money was realized by the appellant, namely, \$18,205.51, which amount is in excess of the total sum appellant had agreed to accept from the appellee.

Such proceeds should not be properly denominated as gross proceeds if in the disposal of the potatoes “outside of Oregon” the appellant had shipped some cars on consignment. The consignee, under such circumstances, would have deducted commissions, freight charges, etc., before remitting proceeds to the consignor. If some of the cars had been shipped f. o. b. destination, then the buyer could have deducted the freight charges, remitting the balance due to the seller. Under such circumstances it would have been perfectly proper to designate the proceeds as “net proceeds.”

The appellant testified that “The buyer pays the cold storage charge, not the seller (R 99).” If we accept that statement the appellant collected the storage charges from the buyers, yet deducts \$1660.70 as an expense.

Appellee never assumed and agreed to pay the cold storage charges. The record shows that the appellant breached the sales contract when he refused to deliver the potatoes because the appellee refused to pay such charges. Appellant now by indirection and, while a failing party to the transaction, unjustly

attempts to hold the appellee liable for such storage charges in the sum of \$1660.70.

The appellant, when wrongfully re-selling the potatoes as belonging to himself, nevertheless claims a selling expense in the sum of \$1085.10, chargeable to the appellee. (R 98). It does not appear that the appellant actually laid out any such selling expense. Appellant was charging the appellee with a brokerage fee of 10c per sack.

Q. Now, coming to this statement that you have prepared, Respondent's Exhibit G, you show a brokerage on 10,851 sacks?

A. Yes.

Q. Did you pay that out?

A. Some of it was paid out and some we charged for our own services.

Q. For your own services? Then you got that money, didn't you?

A. Why, certainly.

Q. But you deducted from that to pay yourself that amount?

A. It is customary brokerage. (T. of T. 144).

We submit that the appellant is not entitled to take these deductions since the appellant and not the

appellee breached the contract; the enhanced price is to be accounted for, not the net profit.

Both the Secretary of Agriculture and the District Court denied to the appellant the right to claim deductions for storage and brokerage.

Had appellee breached the agreement the appellant would have had the right to charge him with reasonable selling expenses, perhaps including brokerage, when re-selling the potatoes for his account. In case of loss, the buyer would have been liable to the seller for such loss; whereas, had the commodity been re-sold for a net profit, the seller would have been required to account to the buyer for the net profit, over and above the price he had agreed to sell to the buyer.

Here, however, the appellant breached the agreement. There was no covenant between the buyer and the seller that the seller would be allowed a selling expense when, acting without authority from the buyer, appellant re-sold the potatoes. Appellant was asserting unwarranted rights.

It seems to us that the appellant would have no more legal right to collect selling expenses, through his own wrongful act, that is, breaching the contract of sale, than one would have had in practicing deceit on his associates.

In the case of *Moe et al v. Lowry*, 194 Pac., 363, Moe was deprived of his stock interest in a mining company because he had misrepresented to his associates the cost thereof, the Court holding that Moe

was not entitled to recover the sum of \$98.00 that he had expended in the promotion of the enterprise. Quoting from the decision:

“When caught in his deceit why should he be permitted to change front and say he ought to be paid or allowed something that the agreement did not provide?”

INTEREST

The Secretary of Agriculture in his order of December 14, 1942, awarded interest to the appellee on the sum of \$4971.56 at the rate of five per cent (5%) per annum from April 6, 1940, until paid, and the District Court in the judgment made and entered in this case (R 55-56) awarded interest on this amount “at the rate of five per cent (5%) per annum from April 6, 1940, to the date hereof (June 6, 1944), and thereafter at the lawful rate of interest.”

Section 22 of Article XX of the Constitution of California fixes the legal rate of interest at seven per cent per annum.

The legal rate of interest in Oregon, Sec. 66-101, OCLA, is six per cent per annum.

Hence, the order of the Secretary of Agriculture was eminently fair to the appellant in fixing a rate of interest lower than that fixed in either the State of California or Oregon.

The Perishable Agricultural Commodities Act,

1930, Ch. 20A, United States Code Annotated, Title 7, p. 227, with regard to interest, provides:

Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment. * * * (Underscoring supplied).

ATTORNEY'S FEE

The district court allowed the appellee an attorney's fee, as a part of his costs on appeal in that Court, in the sum of \$250.00 (R 56).

Under the authority of the Oregon Code this Court did allow attorney's fees in the following cases:

American Surety Co. v. Fischer Warehouse Co., (C. C. A. 9, Ore.) 80 F. (2d) 536, 540;

Horwitz v. New York Life Ins. Co., (C. C. A. 9, Ore.) 80 F. (2d) 295, 302, 303.

The Perishable Agricultural Commodities Act, 1930, Ch. 20A, U. S. Code Ann., Title 7, p. 226, with regard to costs, provides that:

Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs.

While this provision of law applies more directly to appeals in the district court, yet it seems to us that the language is sufficiently broad to support an implied intention to allow attorney's fees as costs on a second appeal. The Act says that the appellee "shall not be liable for costs" if he prevails. Counsel fees are perhaps the greatest item of expense to be incurred in an appeal of this nature.

If the judgment in this case is affirmed, and we respectfully submit it should be, appellee requests that the Court allow him an attorney fee, to be taxed as a part of his costs, in such an amount as to the Court may seem reasonable; and that the judgment bear interest at the rate of five per cent per annum from April 6, 1940, to June 6, 1944, the date of the judgment in the district court, and from and after June 6, 1944, at the rate of seven per cent per annum until paid.

WILSON S. WILEY.

No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BALLEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S REPLY BRIEF.

**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

FORREST E. MACOMBER,

Stockton Savings and Loan Building, Stockton 5, California,

Attorneys for Appellant.

FILED

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**PAUL P. O'BRIEN,
CLERK**



IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EMIL BALLEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S REPLY BRIEF.

**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

Appellee, Balley, in his brief, devotes himself to the following arguments:

He first argues that the evidence shows that the market was advancing between March 15, 1940, and April 6, 1940, from ten cents (10¢) to twenty-five cents (25¢), and in support of this argument, he quotes the testimony of appellant and of himself.

His next argument is that the evidence shows that he could have resold the potatoes for two dollars (\$2.00) per sack to the Los Angeles Potato Distributors, and quotes portions of testimony to this effect.

Appellee then states that he is in accord with the statement of the measure of rule of damages set forth in appellant's opening brief; but, notwithstanding this, he argues that that, after all, is not the measure of damages in this case but it is the enhanced price received by the seller on a resale of the potatoes that is the measure of damages.

The other arguments, such as statute of frauds and f.o.b. defined, we do not deem it necessary to reply to in this brief, as those arguments were advanced before the District Court and found wanting by that Court. On page 31, et seq., of his brief, appellee, Balley, makes some attempt to show that he is entitled to the gross proceeds received by Tozzi on the resale of the potatoes as his measure of damages without deduction for selling expenses, brokerage and other ordinary expenses in connection with the sale of the potatoes by Tozzi.

Replying to Balley's first argument to the effect that the record shows the market price of the goods at the time and place of sale, to-wit: April 6, 1940, at Klamath Falls, Oregon, wherein Balley cites his own testimony to show the market price, we cite the following testimony:

Testimony of Emil Balley.

“Q. (by Mr. Smallpage). Now, I call your attention, Mr. Balley, to this portion of this letter wherein you stated:

‘I purchased potatoes from Streeter, and when I made the agreement the first time it was \$1.40 plus storage, and the second time I came back to

purchase said potatoes I had to pay \$1.45 and storage was not mentioned. I went to pay Streeter hereon the 3rd of April,' and so on.

Now, did you not in this letter refer to the potatoes the subject of this controversy?

A. (by Mr. Balley). It was the same potatoes, yes.

Q. So that, as a matter of fact, then, prior to this contract with Mr. Streeter on March 29, 1940, you had contacted him before and offered him a price of \$1.40 plus storage?

A. I did not offer him a price, no.

Q. Then did you get a quotation from Streeter?

A. I got a quotation from Streeter.

Q. And he told you definitely at that time he wanted \$1.40 plus storage for these particular potatoes, is that right?

A. The storage was mentioned, yes.

Q. And the price was mentioned?

A. That price was mentioned, yes.

Q. And what was the date of that conversation?

A. To the best of my knowledge, it might have been right around the 22nd or 23rd of March.

Q. In other words, then, about a week prior to this second conversation which led to the contract in question?

A. Yes.

Q. *Now, during that period of time did the potato market increase in price or decline?*

A. *Well, to the best of my knowledge, the potato market did not increase or did not decline.*

Q. It was stationary, then?

A. It was about stationary, yes." (Rep. Tr. pages 79-81.) (Italics supplied.)

And again on Rep. Tr. page 82:

“Q. What were you paying for potatoes up there to other sellers at that time?

A. I was buying, loaded f.o.b. cars between Malin and Klamath Falls, at \$1.40 per hundred.”

Again on Rep. Tr. page 85:

“Q. (by Mr. Smallpage). All right. Did it seem strange to you—withdraw that. When this quotation of \$1.40 plus storage was made by Mr. Streeter to you on or about March 22nd, did you think that price too high or too low?

A. (by Mr. Balley). *No, I didn't know much about the price right there. I had just got around to see about the potatoes, and I couldn't tell you whether it was too high or too low.*

Q. Did you buy any potatoes that day?

A. Yes, I believe I did.

Q. What did you pay for them?

A. I believe I paid \$1.25 naked.

Q. And what type of potatoes?

A. Sand-land potatoes.

Q. Is that the same type that Mr. Tozzi's potatoes were?

A. Yes, sir.

Q. You paid \$1.25 naked, which in sacks would be equivalent to \$1.35?

A. That is right.”

Again on Rep. Tr. page 92:

“Q. (by Mr. Smallpage). On April 6th? Now, in April when you and Mr. Streeter could not get together over the terms of this agreement for the purchase and sale of these potatoes, you immediately made a complaint, I take it, to the Agricultural Bureau?

A. (by Mr. Balley). Yes, there was a man suggested I take the deal up there.

Q. And to whom did you make that complaint?

A. To W. A. Hilgeson.

Q. And when was it you made that complaint?

A. I believe around the 14th day of April, but maybe later. That is the best of my knowledge.

Q. Had the market declined or the price at that time, or was it on the up grade?

A. The potato market?

Q. Yes.

A. *I couldn't tell you anything about the potato market. I was not well up on it. I was working on this and I didn't keep up with the market at all.*

Q. *I thought you were in touch with the potato market during this period.*

A. *I was in touch with the market but not at this time. After this controversy between Mr. Streeter and I, I didn't pay much attention to it at all. Most of my contacts were with attorneys to see if we could not get this matter settled."*

It seems to us that this testimony demonstrates clearly that the appellee, Balley, had no idea what the value of the potatoes was, as he testified clearly that he was not in touch with the market and couldn't tell anything about it.

As to Balley's argument that he had an offer from the Los Angeles Potato Distributors at \$2.00 a sack, the fact that Balley may have been able to resell the potatoes to some distributor in the State of California at an enhanced price is not the measure of damages, and this testimony is wholly irrelevant. We submit

that the appellee has failed to produce any evidence to show the market value of a like grade of potatoes at the time and place of sale, and that the rule of measure of damages adopted by the District Court is wholly incorrect.

In

Rice v. Schmid, 25 A. C. 254 (decided November 24, 1944),

the Supreme Court of California for the second time in the same case pointed out the correct measure of damages in a case of this kind, and in that case the lower Court, after the first reversal, did not follow the directions of the Supreme Court and the case was again reversed with specific directions to the lower Court.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Stockton, California,
December 13, 1944.

SMALLPAGE AND MACOMBER,
LAFAYETTE J. SMALLPAGE,
FORREST E. MACOMBER,
Attorneys for Appellant.

No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BAILEY,

Appellee,

VS.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S PETITION FOR A REHEARING.

Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.

Honorable Martin I. Welsh, Judge Presiding.

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

Stockton Savings and Loan Building, Stockton 5, California,

FORREST E. MACOMBER,

First National Bank Building, Stockton 5, California.

*Attorneys for Appellant
and Petitioner.*

FILED

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PAUL P. O'BRIEN

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EMIL BALLEY,

Appellee,

vs.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S PETITION FOR A REHEARING.

**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

Now comes the defendant and appellant in the above-entitled cause, and petitions this Court for a rehearing, and for grounds thereof states as follows:

That the Court, in its opinion filed March 31, 1945, has followed the error of the Court below in assessing damages for appellant's breach of contract. This Court has tacitly agreed with appellant that the rule

of damages in a case of this kind is as appellant contends. The Court then goes on to do what in effect amounts to a specific enforcement of the contract; that is, this Court decreed that appellee is entitled to the gross profit derived by appellant upon a resale of the potatoes in question. This, too, without any allowance for selling expense incurred by appellant upon a resale of the potatoes.

This Court, in its opinion, stated: "Exhibit D, showing the details of appellant's sale, was before the District Court but not included in the Record on Appeal". As a matter of fact, Exhibit D was not before the District Court. (See: Stipulation regarding evidence and testimony in United States District Court, Transcript of Record, page 45.) This Court undoubtedly meant Exhibit G instead of Exhibit D, but Exhibit G is mentioned in the transcript of record on appeal, page 98, and it definitely appears therefrom that, from said exhibit, there was \$18,205.51 received from the sale of the potatoes, to which was added the \$2500.00 received from Mr. Balley, making a total of \$20,705.51, less \$1660.70 cold storage and \$1085.10 selling expense at \$.10 a sack, left a balance of \$17,959.71, which, minus \$15,733.95, the contract price of the potatoes with Mr. Balley, left a balance of \$2225.76, which, as this Court will note, included the \$2500.00 deposit received from Mr. Balley; so that, when said \$2500.00 deposit is deducted from said \$2225.76, there is an actual net loss to Mr. Tozzi. It appears from the reading of the opinion of this Court, that the Court is in sympathy with the appellee Balley and has fallen into

an error of law in its attempt to sustain the judgment of the District Court.

We respectfully submit that the law, as applied in this case, according to the opinion of the District Court, is a departure from all of the existing authorities as set forth in our opening and closing briefs, and that this Court has, in fact, decreed specific performance of a contract relating to personal property, and appellant respectfully requests this Court to grant a rehearing in this case.

Dated, Stockton, California,

April 30, 1945.

Respectfully submitted,

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

FORREST E. MACOMBER,

By FORREST E. MACOMBER,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that the within petition for a rehearing is not interposed for purposes of delay, and that in my judgment the same is well founded.

Dated, Stockton, California,
April 30, 1945.

FORREST E. MACOMBER,
*Of Counsel for Appellant
and Petitioner.*

